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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-1116

OSCAR MCINNIS,
Petitioner

V.

THE UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Oscar McInnis prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this case on September 10, 1979, petition for rehearing denied November 19, 1979.

OPINION BELOW

The opinion of the Fifth Circuit Court of Appeals in *United States v. McInnis* is reported at 601 F.2d 1319. A copy of the slip opinion is attached hereto and marked "Appendix A-1." The judgment based thereon appears as Appendix A-2. The opinion affirmed in part and reversed in part the decision of

the Honorable Robert O'Conor, Jr., Judge of the United States District Court for the Southern District of Texas, dismissing an eight-count indictment against Petitioner. Judge O'Conor's Memorandum and Order, unreported, is attached hereto and marked "Appendix B." The Fifth Circuit affirmed the trial court's dismissal of the count of conspiracy to kidnap with intent to murder, stating that Petitioner's alleged actions and intentions could not constitute a federal offense. However, the Fifth Circuit reversed the trial court's dismissal of seven perjury counts against Petitioner. Petitioner's request for rehearing and rehearing *en banc* on this point was denied on November 19, 1979 (Appendix A-3). It is this portion of the Fifth Circuit's opinion which is sought to be reviewed here.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was rendered on September 10, 1979 (see opinion attached as Appendix A-1). Defendant-Appellee's Petition for Rehearing and Suggestion for Rehearing En Banc was denied on November 19, 1979 (see Appendix A-3). A thirty day enlargement of time in which to petition for certiorari was granted by the Honorable Lewis F. Powell, Jr., in chambers, on December 4, 1979, extending until January 18, 1980, the time in which to file this application. Jurisdiction of this Court lies under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does a federal grand jury have the jurisdictional power to investigate conduct that could not possibly be a federal crime? And if not, can prosecutable perjury be committed before such a grand jury?
2. Do lower federal courts, particularly U.S. District Courts, have the discretionary "supervisory power" to suppress testimony or dismiss indictments for violations of the Justice

Department's internal guidelines respecting the treatment of target witnesses?

3. Did the government's misconduct, including attempted manufacture of federal jurisdiction and violation of its own internal guidelines, cross over the constitutional line into the area of fundamental unfairness as the trial court found?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation; . . . and to have the Assistance of Counsel for his defense.

2. The Fifth Amendment, United States Constitution:

> No person shall . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . .

3. 18 U.S.C. section 1201 (a) and (c). Kidnapping.

> (a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:
>
> (1) the person is willfully transported in interstate or foreign commerce;
>
> * * *
>
> shall be punished by imprisonment for any term of years or for life.
>
> * * *
>
> (c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.
>
> * * *

4. 18 U.S.C. section 1623 (a). False declarations before a grand jury or court.

> (a) Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> * * *

STATEMENT

Petitioner Oscar McInnis and his co-defendant, Patricia Parada, hereinafter called defendants, were indicted by the United States Grand Jury empaneled for the Southern District of Texas, Brownsville Division, on June 7, 1978, and charged with the offense of conspiracy to kidnap and hold for murder one Noe Villanueva. 18 U.S.C. §1201. Following the filing of defendants' Motion to Dismiss said indictment, a superseding indictment was presented on August 1, 1978, adding to the kidnapping conspiracy count seven counts of perjury based on the testimony of defendants before the federal grand jury on the day of their first indictment. 18 U.S.C. §1623.

The government's evidence of the kidnapping conspiracy was based on a series of tape-recorded conversations from April 19 to June 6, 1978, between McInnis and Daniel Rodriquez, an inmate in the Hidalgo County Jail. The government also had a tape-recording of purported conversation on May 21 between Parada and her ex-husband Noe Villanueva, the intended victim. The government contends that these tapes show, in a nutshell, that McInnis and Parada conspired to lure Villanueva across the border to Reynosa where one Cantu, a Mexican police official friend of Rodriquez', would kill Villanueva and dispose of the body. Transcripts of the foregoing conversations were introduced at the September 8, 1978, hearing on defendants' pretrial motions and were appended to the government's brief in the Fifth Circuit. With some factual inaccuracies noted in

Petitioner's first Reason for Granting the Writ, this scenario was summarized in the Fifth Circuit's opinion at 7377-7378

Following the September 8 hearing on defendants' motion to dismiss the indictment, Judge O'Conor granted the motion and dismissed the indictments in their entirety. *See* Memorandum and Order of September 15, 1978 (Appendix B).[1] On the conspiracy to kidnap count, he ruled that no such federal offense could have occurred because the tapes showed only that the defendants had sought to induce the victim to cross the United States border alone and of his own volition. Instead, there must be "a taking or holding of . . . [the victim] against his will and then a transporting of the victim against his will or under false pretenses in foreign commerce." (*Id.* at 2B). The government took an appeal from the trial court's order dismissing all counts of the indictment, but this aspect of the ruling was affirmed by the Court of Appeals for the Fifth Circuit in Part III. A. of its opinion (Appendix A).

The circumstances surrounding defendants' grand jury appearance and conspiracy indictment on June 7, and their subsequent perjury indictment were also developed at the pretrial hearing on September 8 and proved to be quite unusual. Following the presentation of the tape-recordings to the grand jury, the United States Attorney's office (hereinafter, the government) determined to subpoena the putative

[1]On the basis of the tapes themselves, defendants also sought to quash the indictments on the grounds that they were entrapped by government agents. The trial court, of course, did not have to reach this issue. It was dispositive, however, of the state conspiracy to kidnap charges which were filed against defendants shortly after their federal charges were dismissed. An extensive hearing was held November 13-15, 1978, into the government's role in advancing this alleged conspiracy in cause no. CR-652-78-D in the 206th District Court of Hidalgo County, Texas, the Honorable Vernon D. Harville, Special Judge, presiding. In granting McInnis' Motion to Suppress the tape-recorded conversations, the state judge found that Rodriquez originated the criminal enterprise in this case and entrapped McInnis into joining. (See Order on Defendant's Motion to Suppress, attached as Appendix C-1; See also State's Motion to Suppress, attached as Appendix C-1; See also State's Motion to Dismiss and Order, attached as Appendix C-2).

defendants, McInnis and Parada. Some of the details of the service of these subpoenaes are narrated in the Fifth Circuit's opinion (p. 7378, n.4). Defendants' testimony before this grand jury resulted in their indictments on seven counts of perjury (six charging McInnis and one charging Parada). The superseding indictment was not filed until *after* defendants' Motion to Dismiss the initial indictment was filed on July 10, 1978. The significance of this timing was not lost on the district judge. *See* Memorandum and Order at 7B, *infra*.

Assistant United States Attorney Ron Woods testified at the pretrial hearing on September 8. He admitted that he thought that the grand jury possessed sufficient evidence in the tape-recorded conversations to bring forth an indictment on the kidnapping conspiracy charge without the defendants' testimony. He attempted to justify the necessity for calling the defendants as witnesses, the issuance of subpoenaes instead of summonses, and the decision to keep the defendants ignorant of their target witness status until they were in the grand jury room.

The trial court found as a matter of fact (*See* Memorandum and Order at 4B-7B, *infra*) that the government's actions had violated its own guidelines for the treatment of target witnesses contained in Section 9-11.250 of the *Manual for U.S. Attorneys* (reprinted in Appendix D). These guidelines were introduced into evidence at the September 8 pretrial hearing, appended to the government's brief in the Fifth Circuit, and were correctly summarized in the trial court's Memorandum and Order (4B-5B, *infra*). As to the necessity for calling the defendants as witnesses, the district court found:

> [T]he real purpose for calling Parada and McInnis before the grand jury was to get them to perjure themselves . . . . The government was using the crime of perjury to insure that the defendants did not slip away. This is not the purpose of a grand jury. (Memorandum and Order, at 7B, *infra*).

The trial court also placed little stock in Woods' reasons for keeping the defendants ignorant of the investigation, saying,

> it is doubtful that the defendants would leave family, friends and jobs to flee to Mexico; the two government witnesses were safe from harm — Noe Villanueva's whereabouts being known only to the government, and Daniel Rodriquez being safely in the hands of Brig Marmolejo, who was cooperating with the government. (*Id.* at 6-B).

In his September 15 order dismissing the perjury counts against defendants (Appendix B), Judge O'Conor cited two reasons for his decision. First, since the alleged kidnapping conspiracy could not have been a federal offense (and since the grand jury should have known this before defendants were called),

> it follows that the grand jury was also without jurisdiction to consider the matter. That being the case, any statements made before the grand jury would lack materiality to any legitimate area of inquiry for the grand jury, materiality being a requisite of the crime of perjury. (*Id.* at 3B-4B).

Secondly, the government's violation of its own internal guidelines, the manufacture of federal jurisdiction, and the abuse of the grand jury process all combined to deprive defendants of fundamental fairness. (*Id.* at 4B-7B). The government appealed this aspect of the trial court's decision and the Fifth Circuit Court of Appeals reversed in Part III. B. of its opinion dated September 10, 1979 (Appendix A). Petitioner sought rehearing and rehearing *en banc* of this portion of the panel's opinion, but said requests were denied on November 19, 1979 (Appendix A-3). It is this portion of the Fifth Circuit's opinion which Petitioner brings to this Court for review.

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW WOULD EXPAND THE SCOPE OF THE GRAND JURY'S INVESTIGATORY POWERS BEYOND EXISTING LAW AND WOULD HOLD SUCH POWERS TO BE VIRTUALLY WITHOUT LIMIT.

This case presents yet another challenge to the increasing abuse

of the grand jury process. The question to be answered is whether this Court will recognize any limitation on grand jury investigatory powers.

It is well-established that the grand jury has enormous investigatory prerogatives extending to areas which may never, for a variety of reasons, result in the initiation of criminal prosecutions. *Blair v. United States*, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979 (1919). This Court has taken a dim view of any preliminary, procedural or time-consuming inquiries into the grand jury's functioning. Thus, no complaint will be heard about the quality of evidence upon which an indictment was obtained. *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956); this Court does not require preliminary showings which would impede the grand jury's functioning. *United States v. Dionisio*, 410 U.S. 1,17, 93 S.Ct. 764, 35 L.Ed.2d 67,81 (1973); and this Court will not allow most claims of privilege or constitutional violations to deprive a grand jury of the evidence it needs to discharge its functions. *Branzburg v. Hayes*, 408 U.S. 665, 701, 92 S.Ct. 2646, 35 L.Ed.2d 626, 651 (1972); *United States v. Calandra*, 414 U.S. 338, 349-350, 94 S.Ct. 614, 38 L.Ed.2d 561, 572-573 (1973). This court has never spoken to the jurisdictional limitations, if any, on a grand jury's investigatory powers.

The federal courts, however, have stopped short of issuing a blank check to the federal grand jury. *See, e.g., Levinson v. Attorney General*, 321 F.Supp. 984 (E.D. Pa. 1970). Thus, *Brown v. United States*, 245 F.2d 549 (8th Cir. 1957) quashed an indictment and condemned a federal grand jury which had become a "roving commission" investigating matters outside its lawful authority. This holding has been cited in other circuits and has even been recognized by this Court. *United States v. Mandujano*, 425 U.S. 564, 582, 96 S.Ct. 1768, 1779, 48 L.Ed.2d 212, 226 (1976) at fn. 8. Similar to *Brown*, this case presents a picture of a federal grand jury, loose from its jurisdictional moorings, running amok in areas clearly outside its authority. Therefore, certiorari is appropriate to correct the ruling of the Fifth Circuit in an important area of federal law not heretofore settled by this Court. Rule 19(b), Supreme Court Rules.

Petitioner will now turn to a consideration of the errors in and implications of the opinion of the Fifth Circuit below. It has been Petitioner's contention from the outset that the government's theory of prosecution did not constitute the federal offense of conspiracy to kidnap for the purpose of murder. Part III. A. of the opinion of the court below concurred in this conclusion, stating that the federal kidnapping statute has never and still does not apply when the interstate transportation is accomplished by the victim on his own. This has been the law since *Chatwin v. United States*, 326 U.S. 455 (1945). The United States Attorney, and the grand jury which he directs, are charged with knowing the law. At the time when the defendants were subpoenaed to give their testimony before the grand jury in the instant case, it was established as a matter of law that no federal kidnapping crime had been contemplated by the defendants.

In addition to seeking a correct statement of the law in this area, Petitioner regrets the necessity of pointing out gross factual inaccuracies in the opinion below which went uncorrected even after he petitioned for rehearing. These factual inaccuracies do double damage to Petitioner's own rights in this case, even as they ameliorate the Fifth Circuit's incorrect statement of the law.

The opinion below relied upon the acknowledged authority of a grand jury to investigate even the mere possibility that a crime had been committed. In so doing, however, the court indulged in several speculative assumptions not supported in the record and flatly contradicted by the tape-recordings already before the grand jury:

> The plot brought to the attention of the grand jury might have turned out to be a federal crime. The tapes and the other evidence might have revealed that McInnis and Parada planned to take Villanueva to Mexico themselves, or even that the Mexican police officer planned to bring Villanueva across the border. Slip op. 7376, 7358-86 (Appendix A-1).

Petitioner does not quarrel with the initial authority of the

grand jury to investigate this possible crime and to listen to every tape-recording containing evidence of it. But it was established at the hearing on Defendant's Motion To Dismiss that the tapes had been played, the investigation of the kidnapping plot was complete, and the grand jury did not need any further evidence to return its indictment (Memorandum and Order, at 6B-7B, *infra*). The transcripts of these tape-recordings were before both the trial court and the Fifth Circuit and unequivocally revealed a plot as outlined at pp. 7377-7378 of the opinion below which could not have constituted a federal offense. Thus the grand jury knew the defendants' anticipated testimony would fall in an area beyond federal jurisdiction. It was uncontroverted that the defendants were called not to shed light on the kidnapping plot but simply to get them to perjure themselves (Memorandum and Order, at 6B-7B, *infra*). These fact-findings made by the trial court should not be disturbed on appeal unless found to be "clearly erroneous," Rule 52(a), F.R.Civ.P.; *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 394-95, 92 L.Ed. 746, 765-66 (1948), and certainly do not permit the kind of factual inaccuracies quoted above.

To state an offense under 18 U.S.C. §1623, the statute explicitly requires that the charge be based on testimony *material* to a *proper* inquiry of the grand jury. *See United States v. Phillips*, 540 F.2d 319, 328 (8th Cir.), *cert. denied*, 429 U.S. 1000 (1976). False declarations made before a grand jury material only to an investigation beyond its jurisdiction or authority do not constitute perjury. *See United States v. Mandujano*, 425 U.S. 564, 582 n.8 (1976); *United States v. Jacobs*, 543 F.2d 18, 20 (7th Cir. 1977), *cert. denied*, 431 U.S. 929 (1977); *Masinia v. United States*, 296 F.2d 871, 877 (8th Cir. 1961); *Brown v. United States*, 245 F.2d 549, 552 (8th Cir. 1957). Not only could the grand jury not *properly* proceed beyond the whole theory of the case as developed by all the tape recordings, it was not influenced and could not possibly have been influenced by anything the defendants had to say.

Lest we belabor these elementary factual and legal points, however, we should return to the reasons for granting certiorari in this case. Unfounded factual speculation contained in

the court's opinion has already been noted and quoted above. Careful consideration of the opinion reveals profound implications for grand jury jurisdiction and raises serious questions about the role of that body in both a federal system and a free society. It is now established that the defendant's alleged plans (or were they the government's?) could not have constituted a federal crime and that the government and the grand jury knew this before the defendants were called. If the Fifth Circuit's opinion goes uncorrected, it will have sanctioned the "roving commissions" condemned in *Brown*, *supra*; it will permit wide-ranging investigations knowing no jurisdictional bounds; and it will threaten individual liberties in a way reminiscent of the Star Chamber.

II. THE SUPERVISORY POWER OF THE FEDERAL COURTS TO ENFORCE THE JUSTICE DEPARTMENT'S INTERNAL GUIDELINES HAS BEEN INTERPRETED DIFFERENTLY BY THE SECOND AND FIFTH CIRCUITS AND REMAINS IN DOUBT AFTER *UNITED STATES V. CACERES*, —U.S.—, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979).

A. Introduction.

As noted in the Statement, *supra*, and Memorandum and Order, Appendix B, *infra*, Judge O'Conor found numerous violations by the government of Department of Justice Guidelines for United States Attorneys' treatment of "target" grand jury witnesses (reprinted in Appendix D, *infra*). Together with the government's attempt to "manufacture federal jurisdiction" and "abuse of the grand jury process" (Memorandum and Order at 7B, *infra*) in this case, the violations of internal Justice Department policies and guidelines convinced the district court that the defendants had been deprived of their rights to fundamental fairness, and that the perjury counts should be dismissed. (*Id.* at 4B, 6B-7B).

The Fifth Circuit panel's opinion in the instant case, in addition to upholding the *jurisdiction* of the grand jury to investigate "possible" federal offenses (*cf.* Petitioner's first Reason for Granting the Writ, *supra*), held that "the courts are not charged with enforcing internal governmental guidelines and will not

remedy an alleged violation by the dismissal of an indictment . . . or the exclusion of evidence . . . ." slip op. at. 7386. Apparently reasoning that federal courts are powerless to exclude evidence or dismiss indictments unless governmental misconduct "cross[es] the constitutional line," *id.*,[2] the Fifth Circuit panel misconceived the state of the law in the Fifth and other Circuits, and misconstrued the holding of this Court in *Unites States v. Caceres*, —U.S.—, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979) and *McNabb v. United States*, 318 U.S. 332 (1943).

Petitioner maintains that *Caceres* is not, contrary to the Fifth Circuit panel, dispositive of the propriety of the trial court's dismissal of the perjury counts; that this Court's dismissal of a previously granted writ of certiorari to the Second Circuit in *United States v. Jacobs*, 547 F.2d 772 (1976) indicates that the superficially inconsistent *Caceres* should be read and applied narrowly; and that the exercise of supervisory powers by federal courts pursuant to *McNabb* — a viable and universal practice — requires that the trial judge's dismissal of the perjury counts be affirmed.

B. *United States v. Caceres* is not Dispositive.

In reversing the trial court's dismissal of the perjury counts, the Fifth Circuit cited *United States v. Caceres*, —U.S.—, 99 S.Ct. 1465, 59 L.Ed.2d 733 (1979) as holding that *courts may not* remedy government misconduct — particularly the violation of internal governmental guidelines — by the exclusion of otherwise admissible evidence. In *Caceres*, this Court held only that where the violation of an IRS regulation controlling the use of "consensual electronic surveillance" reflected a "reasonable, good faith attempt to comply," *id.* at —, 99 S.Ct. at 1474, 59 L.Ed.2d at 746, had "no discernible effect . . . on the action taken by the agency and its treatment of respondent," *id.* at —, 99 S.Ct. at 1472, 59 L.Ed.2d at 743-44, and did not prejudice the respondent in any way, *id.*, "we decline to adopt any rigid rule *requiring* federal courts to exclude any evidence obtained as a violation of these [executive agency]

[2] *See* Petitioner's third Reason for Granting the Writ, *infra*, arguing that a violation of due process — fundamental fairness did, in fact, occur.

rules." *id.* at —, 99 S.Ct. at 1473, 59 L.Ed.2d at 745 (emphasis added).

Importantly, this Court expressly reserved the power to adopt such an exclusionary rule, *id.* n.22, left open the possibility of a "more limited, individualized . . . case-by-case approach," *id.* —, 99 S.Ct. at 1474, 59 L.Ed.2d at 746, and noted that *under the narrow facts of Caceres*, "there is no reason why a court should exercise *whatever discretion it may have* to exclude evidence obtained in violation of the [agency] regulations," (emphasis added). Petitioner maintains that the facts of the instant case are fundamentally different than the facts of *Caceres* in every critical respect. By failing to recognize these crucial distinctions, and by reading *Caceres* as barring any judicial enforcement of internal governmental guidelines, the Fifth Circuit panel misconceived and misapplied the holding in that case.

This Court's uneasiness with inflexible exclusionary rules is a well-known and valid concern. *See, e.g., Brewer v. Williams*, 430 U.S. 387, 421 (1977) (Burger, C.J., dissenting); *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 412-24 (1971) (Burger, C.J., dissenting). Thus, any extension of the rigid exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961) or *Miranda v. Arizona*, 384 U.S. 436 (1966) from constitutional violations to nonconstitutional wrongs is unlikely. *Cf. United States v. Caceres*, —U.S.—, 99 S.Ct. 1465, 1474, 59 L.Ed.2d 733, 747 (1979) (Marshall, J., dissenting) (treating all violations of internal regulations affording procedural protections as due process violations).[3] However, whether a defendant has the right to demand the application of a rigid exclusionary rule is a legally and conceptually distinct issue from whether a federal district court has the *discretionary power* to exclude evidence or dismiss indictments as a remedy for particular agency violations of internal guidelines. While this Court rejected the

[3]*But see* Petitoner's Point Three, *infra* (arguing that the quantum of government misconduct in this case *did* rise to the level of a due process violation).

former in *Caceres*, it expressly reserved judgment on the latter.[4]

The violation of IRS regulations for obtaining authorization to record telephone conversations with taxpayers in *Caceres* was *de minimus* because, as noted, the local agents acted in good faith and, as the Court pointed out,

> precisely the same prejudice would have ensued if the approval [eventually obtained on February 11, 1975] had been issued more promptly. For the record makes it perfectly clear that *a delay in processing the request rather than any doubt about its propriety or sufficiency*, was the *sole* reason why advance authorization was not obtained before February 11.

—U.S. at —, 99 S.Ct. at 1472, 59 L.Ed.2d at 744 (emphasis added). The instant case, however, does not involve a good-faith misinterpretation of the applicable rules. Despite the prosecutor's protestations to the contrary, Judge O'Conor found as a fact that the government purposefully and maliciously violated "all" of the prescribed Justice Department guidelines (*see* Memorandum and Order at 5B, *infra*), acting in bad faith for the sole purpose of tricking the defendants into committing perjury. (*Id.* at 6B-7B). The trial court in this case found that

> [h]ad the defendants been given the opportunity [that the violated guidelines would have afforded] to consult with an attorney prior to their appearance before the grand jury it is predictable that *they would not have testified before the grand jury.*

(*Id.* at 6B) (emphasis added).

While the violation of IRS regulations in *Caceres* was in good faith, caused no injury and had no effect on Caceres' substantive rights, the violation of internal guidelines in the instant case was in bad faith, had a clear causal connection with defendants' subsequent indictment for perjury, and very materially affected the government's treatment of Petitioner.

[4]In addition, as Petitioner argues in Reason II(c) & (d) *infra*, the saga of *United States v. Jacobs*, 547 F.2d 772 (2nd Cir. 1976), supports the latter concept.

Moreover, the conduct regulated by the IRS guidelines in *Caceres* was clearly constitutional, legal, and fair. *See Lopez v. United States*, 373 U.S. 427 (1963) and *United States v. White*, 401 U.S. 745 (1971). In contrast, the guidelines in the instant case advance vital protections sounding in Fifth and Sixth Amendment law and were promulgated by the Justice Department to supplant the protection withdrawn by *United States v. Mandujano*, 425 U.S. 564 (1976) and *United States v. Washington*, 431 U.S. 181 (1977). *See* Appendix D, *infra*. Additionally, subpoenaing "target" witnesses who are putative defendants actually or effectively[5] under indictment is a violation of due process, *United States v. Doss*, 563 F.2d 265, 278 (6th Cir. 1977) and a violation of the A.B.A. Standards Relating to the Prosecution Function. *See* A.B.A. Project on Standards for Criminal Justice, *The Prosecution Function* §3.6(d) (1971):

> If the prosecutor believes that a witness is a potential defendant he should not seek to compel his testimony before the grand jury without informing him that he may be charged and that he should seek independent legal advice concerning his rights.

See also id. §§1.1(d) & 2.5 (treating both internal guidelines and the canons of ethics as standards of professional conduct).

[5]*See* Petitoner's Third Reason for Granting the Writ, arguing that the Fifth Circuit panel's assumption in 601 F.2d at 1328 & n.16 that "there is no evidence in the record that the indictment had actually been issued at the time that the two testified," is erroneous, and contrary to the district court's findings that "[t]here was no need for the defendants to appear before the grand jury," (Memorandum and Order at 6B, *infra*) and "[t]he evidence shows that the real purpose for calling . . . [the defendants] before the grand jury was to get them to perjure themselves." (*Id.* at 7B). Under these circumstances, the assumption of the Fifth Circuit panel that "the indictment was prepared and filed after . . . [the defendant] testified to the grand jury," 601 F.2d at 1328 n.16 seems both unwarranted and strangely formalistic in its emphasis on "the precise time of filing." For if the investigation and evidence were already complete, and the subpoenas were purely to surprise the defendants into perjuring themselves, the unfairness and due process violation should not turn on the distinction of the defendants' "actual" versus "effective" indictment.

The Supreme Court in *Caceres* did not purport to overrule *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1969); *United States v. Sourapas*, 515 F.2d 295, 298 (9th Cir. 1975); or *United States v. Leahey*, 434 F.2d 7 (1st Cir. 1970). These cases all involved reversals of tax prosecutions because of IRS violations of its own regulations more closely affecting taxpayer's rights than those involved in *Caceres*.[6] These cases were cited with authority three months after *Caceres* in *Delay v. United States*, 602 F.2d 173 (8th Cir. 1979).

If a case-by-case approach is adopted in the granting of judicial remedies for violations of internal governmental guidelines, unlike *Caceres* the instant case would be one in which a remedy would be granted. Thus this case affords this Court an opportunity to answer the question left open in *Caceres*.

C. This case is in conflict with the Second Circuit's decision in *United States v. Jacobs*.

The facts of the instant case are very similar to the facts of *United States v. Jacobs*, 531 F.2d 87 (2nd Cir.), *vacated and remanded*, 429 U.S. 909 (1976), *aff'd on remand*, 547 F.2d 772, (2nd Cir. 1976), *cert. granted*, 431 U.S. 937 (1977), *cert. dismissed as improvidently granted*, 436 U.S. 31 (1978), and the failure of the Fifth Circuit panel to mention or attempt to reconcile the contrary result reached by the Second Circuit in that case highlights the ambiguity created by *Caceres*, the conflicts between the circuits, and the importance of this case. The vitality and scope of the federal courts' "supervisory power" needs to be affirmed and defined. The diametrically opposed holdings of the Second Circuit in *Jacobs* and the Fifth Circuit in the instant case cannot be reconciled on their facts and present an important and significant question of law that can be resolved only by this Court. A writ of certiorari to the

[6]In fact, the IRS regulations enforced in those cases were regulations requiring the Service to give fair notice to taxpayers who were being investigated for criminal tax fraud. Thus, the regulations enforced in those cases closely parallel the Justice Department internal guidelines violated in this case. Both sets of regulations prescribe fair notice to putative defendants. For a further discussion of these and other "supervisory powers" cases, see Petitioner's Reason II.(d), *infra*.

U.S. Court of Appeals for the Fifth Circuit should, therefore, be granted.

The most complete statement of the facts in *Jacobs* appears in the first opinion of the Second Circuit, 531 F.2d 87 (1976). District Judge Neaher had granted a motion to suppress Jacobs' grand jury testimony, and dismissed the corresponding perjury count of the indictment against her, *id.* at 88, because the federal prosecutor had not informed her of her status as a putative defendant when she was subpoenaed to appear before a grand jury. Judge Neaher, in an unreported opinion, made findings of fact that the prosecutor's failure to warn her of her status was improper conduct, and that Jacobs had been led into a trap because "the questions which led to the alleged perjurious responses served *no other function* than to give the government an additional prop on which to base its case against defendant" (emphasis in original). *Id.* at 89. Finding a violation of the due process clause of the Fifth Amendment, the district judge dismissed the perjury count and suppressed the grand jury testimony. It should be noted that the findings of Judge Neaher in *Jacobs* and Judge O'Conor in the instant case are remarkably similar. The only difference is that while Judge Neaher rested his decision solely on constitutional grounds, Judge O'Conor invoked both due process and supervisory powers.

The Second Circuit did not reach the constitutional question, holding instead that because the failure to warn a target witness violated §3.6(d) of the A.B.A. Standards Relating to the Prosecution Function (*see* 531 F.2d at 89-90) and was contrary to the standard practice of prosecutors within the circuit, the district court's suppression and dismissal would be affirmed solely in the exercise of supervisory powers. *Id.* at 90-91. The Supreme Court vacated the judgment of the Second Circuit and remanded for consideration in light of *United States v. Mandujano*, 425 U.S. 564 (1976). *See* 429 U.S. 909 (1976). Justice Stevens, the author of *Caceres*, concurred in the *Jacobs* remand because

> [T]he Court of Appeals opinion seems to assume that the conclusion [that the witness cannot be prosecuted for perjury] necessarily follows from the premise [that the prosecutor may have erred in failing to give a grand jury witness adequate warnings]. Since I think it would be appropriate for that court to address that precise point in the first instance, I acquiesce in the remand.

429 U.S. at 910. Dissenting from the remand, Justice Marshall, with whom Justices Brennan and Stewart joined, observed that

> [O]ur holding [in *Mandujano*] that respondent would not have had a constitutional right to have her testimony suppressed simply has no bearing on a lower court decision which did not assume the existence of such a constitutional right. And it is clear that the well-established supervisory power of the courts of appeals over the district courts in their respective jurisdictions is not limited to enforcing constitutional rights .... Accepting the Government's suggestion that we vacate and remand so that the Court of Appeals can reconsider its decision in light of an irrelevant case is a waste of the time of two courts.

Id. at 910-11 (citations omitted).

On remand, the Second Circuit made clear that it was aware of *Mandujano* and affirmed the district court solely in the exercise of its supervisory powers. 547 F.2d 772, 773-78. The Second Circuit eschewed the formulation of a rigid, "inexorable" rule, *id.* at 775, noting that the limited exercise of supervisory powers in *Jacobs* "is not intended to mandate any specific procedure, but to serve as an *ad hoc* sanction, as in [*United States v.*] *Estepa* [471 F.2d 1132 (1972)], to enforce 'consistent performance' one way or another." 547 F.2d at 778. Citing *Cupp v. Naughten*, 414 U.S. 141, 146 (1973) (Rehnquist, J.); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957); *McNabb v. United States*, 318 U.S. 332, 340 (1943); and *Burton v. United States*, 483 F.2d 1182 (9th Cir. 1973), the Second Circuit rejected the claim that the Courts of Appeal do not have, or cannot exercise, supervisory power.

The Supreme Court again granted certiorari, 431 U.S. 937 (1977), this time without opinion. After argument in the Supreme Court, however, the writ of certiorari was dismissed as

having been improvidently granted. 436 U.S. 31 (1978) (per curiam). Implicit in the dismissal is the vindication of the dissenting opinions of Justices Marshall, Brennan, and Stewart, 429 U.S. 909, 910-11 (1976), and the recognition of lower federal courts' supervisory power over the administration of justice in their respective jurisdictions.

In contrast, the Fifth Circuit panel's opinion in the instant case denies the power of lower federal courts to remedy or deter unfair and improper prosecutorial misconduct *unless there has been a constitutional or statutory violation.* The Fifth Circuit panel in the instant case misread *Caceres* and failed to even cite *Jacobs*, and arrived at a conclusion at odds with the Second and other Circuits, and inconsistent with well-established Supreme Court doctrines. The Fifth Circuit's confusion as to the existence and scope of lower federal courts' supervisory power needs to be corrected. The confusion is compounded by the full history of *Jacobs* and the failure of *Caceres* to mention or distinguish *Jacobs*. Only the granting of a writ of certiorari in this case will resolve this important conflict in the administration of federal criminal justice.

D. *McNabb v. United States*: The Need for an Ad Hoc Discretionary Approach to the Exercise of Supervisory Powers.

In *McNabb v. United States*, 318 U.S. 332 (1943) this Court went beyond the constitution in articulating a rule of procedure for the federal judiciary that otherwise voluntary statements obtained by defendants who were not promptly arraigned would be rendered inadmissible. With the following language Justice Frankfurter created the concept of "supervisory powers":

> Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards . . . which are summarized as "due process of law . . . .

> *The principles governing the admissibility evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution.* In the exercise of its supervisory authority over the administration of criminal justice in the federal courts . . . the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance.

318 U.S. at 340-41 (emphasis added) (citations omitted). *See also Ker v. California*, 374 U.S. 23, 30 (1963).

These "considerations of justice," the core of the notion of supervisory powers, are *not* a rigid, inexorable exclusionary rule. Rather, considerations of justice involve the careful balancing of interests and first hand observation of the circumstances and realities of the administration of criminal justice that federal district judges are uniquely qualified to perform. The philosophy of *McNabb* requires that federal district courts be able (*not required*) to remedy and deter prosecutorial misconduct and other governmental abuses falling short of constitutional violations with selective, discretionary power to exclude evidence and dismiss indictments on an ad hoc basis. This power is, contrary to the Fifth Circuit panel in the instant case, recognized throughout the federal judiciary and has not been curtailed by this Court's decision in *Caceres*.

United States v. Payner, 434 F.Supp. 113, 133-36 (N.D. Ohio 1977), *appeal dismissed for want of jurisdiction*, 572 F.2d 144 (6th Cir. 1978), *aff'd after remand per curiam*, 590 F.2d 206 (6th Cir. 1979) (rehearing *en banc* denied), for example, recognized that "federal courts sustain supervisory power to exclude evidence which the Government obtained in a manner so inconsistent with American standards of justice [though short of a constitutional violation] that to allow admission of the evidence calls into question the integrity of the entire federal judicial system." 434 F.Supp. at 125 (citing *McNabb v. United States*, 318 U.S. 332, 340-44 (1943) and *Elkins v. United States*, 364 U.S. 206, 216-23 (1960)). Though the district court in *Payner* held that the exclusion was "required under Due Process *and* supervisory powers because the Government might . . . argue that supervisory power to exclude is

limited to . . . instances specified under the federal criminal rules," 434 F.Supp. at 133 n.72 (emphasis added), the Sixth Circuit expressly held that "the district court did not err in suppressing the evidence in the exercise of *its* supervisory powers." 590 F.2d at 207 (emphasis added). Thus it is clear that in the Sixth Circuit, supervisory power pursuant to *McNabb* not only exists, but extends to district courts.

In varying factual circumstances, the First (*see United States v. Leahey*, 434 F.2d 7 (1st Cir. 1970); *United States v. Coast of Maine Lobster Co.*, 538 F.2d 899, 902 (1st Cir. 1976) (supervisory powers exercised to overturn conviction and order new trial because prosecutor, in violation of the A.B.A. Standards Relating to the Prosecution Function and Code of Professional Responsibility made a public statement concerning pending trial that fell short of a constitutional violation)); Second (*see United States v. Jacobs*, 547 F.2d 772, 775 (2nd Cir. 1976) *cert. granted*, 431 U.S. 937 (1977), *cert. dismissed as improvidently granted*, 436 U.S. 31 (1978) (violation of A.B.A. Standards and long-standing practice in circuit)); Fourth (*see United States v. Heffner*, 420 F.2d 809 (4th Cir. 1969) *(violation of IRS regulations)*; *Fifth (see Williamson v. United States*, 311 F.2d 441, 444 (5th Cir. 1962) (conviction reversed under supervisory powers because "it becomes the duty of the courts in federal criminal cases to require fair and lawful conduct from federal agents")); Seventh (*see United States v. Brown*, 411 F.2d 930, 933 (7th Cir. 1969), *cert. denied*, 396 U.S. 1017 (1970)); Eighth (*see Delay v. United States*, 602 F.2d 173 (8th Cir. 1979)); Ninth (*see United States v. Sourapas*, 515 F.2d 295 (9th Cir. 1975) (rehearing *en banc* denied) (violation of IRS regulations)); Tenth (*see United States v. Thomas* 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973); *United States v. Alberico*, —F.2d—, Nos. 78-1053-1062-63 (10th Cir. Aug. 24, 1978) (following *United States v. Coast of Maine Lobster*, *supra*)); and D.C. Circuits (*see United States v. Thomas*, 146 U.S. App. D.C. 101, 449 F.2d 1177, 1186 (1971)) have gone beyond the dictates of the fourth, fifth, and fourteenth amendments of the U.S. Constitution to exclude evidence, dismiss

indictments, and order new trials in the exercise of *supervisory powers*.

The essential role of trial courts in the exercise of supervisory powers was identified in *United States v. Thomas*, 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973), in which the court held that a voluntary statement that a prosecutor obtained from a criminal defendant without the presence of his counsel, in violation of the canon of ethics (though admissible under the U.S. Constitution),

> may not be offered in evidence for any purpose . . . . To hold otherwise . . . would be to overlook conduct which violated both the letter and the spirit of the canon of ethics . . . . This does not necessarily present a constitutional question, but this is an ethical and administrative one *relating to attorneys before the United States courts. The problem is initially for trial courts* . . . .

474 F.2d at 112 (emphasis added).

Therefore, the Fifth Circuit panel's reversal of the district judge's dismissal of the perjury counts of the indictment against Petitioner was erroneous, and a writ of certiorari should be granted to the Fifth Circuit to preserve the exercise of supervisory powers by lower federal courts.

III. GOVERNMENTAL MISCONDUCT, INCLUDING VIOLATION OF ITS OWN INTERNAL GUIDELINES, ATTEMPTED MANUFACTURE OF FEDERAL JURISDICTION, AND ABUSE OF THE GRAND JURY PROCESS, DEPRIVED PETITIONER OF FUNDAMENTAL FAIRNESS.

As one alternative reason for dismissing the perjury counts of the indictment Judge O'Conor found that the misconduct of the prosecutors deprived Petitioner of fundamental fairness. (See STATEMENT, *supra*, and Memorandum and Order, Appendix B).

The impact of the due process clause is *not* limited to the specific provisions of the Bill of Rights. The clause also sets a stan-

dard of fundamental fairness. For example, *Simmons v. United States*, 390 U.S. 377 (1968), recognized that certain kinds of identification procedures might be inherently unfair. *See also Rochin v. California*, 342 U.S. 165 (1952); *Spencer v. Texas*, 385 U.S. 544 (1967); *Brady v. Maryland*, 373 U.S. 83 (1963); *Giles v. Maryland*, 386 U.S. 66 (1967); and *In re Winship*, 397 U.S. 358 (1970).

This Court has recognized that abuse of the grand jury process or prosecutorial misconduct that undermines the fairness of grand jury proceedings can properly result in dismissal of indictments or reversal of convictions obtained on those indictments. *United States v. Washington*, 431 U.S. 181, 190 n.6 (1977); *United States v. Mandujano*, 425 U.S. 564, 582 n.8 (1976); *Id.* at 609 (Stewart, J., concurring). The doctrines of fundamental fairness and grand jury abuse are firmly established in the Courts of Appeals. *See, e.g., United States v. Ciambrone*, 601 F.2d 616, 623 (2nd Cir. 1979); *United States v. Doss*, 563 F.2d 265 (6th Cir. 1977) (en banc); *United States v. Basurto*, 497 F.2d 781, 785-786 (9th Cir. 1974); *United States v. Estepa*, 471 F.2d 1132 (2nd Cir. 1972); *Brown v. United States*, 245 F.2d 549 (8th Cir. 1957). Indeed the Court of Appeals in this case recognized the existence of the doctrine, but, disregarding the misconduct specifically found by the trial court, found no fundamental unfairness in Petitioner's treatment (Appendix A-1, Part III. C.).

While this Court has recognized the due process implications of prosecutorial misconduct, little guidance has been afforded the Courts of Appeals in this area. No clear constitutional standards for prosecutorial conduct exist. The Ninth Circuit has held that an indictment cannot stand when it is based on testimony known by the prosecutor to be perjurious. *United States v. Basurto, supra*. The Second Circuit has further required that the prosecutor not rely on hearsay testimony when eyewitness testimony is available, especially when the grand jury is mislead into believing it is receiving eyewitness testimony. *United States v. Estepa, supra*. In *United States v. Ciambrone, supra*, the Second Circuit indicated that in order to require dismissal of an indictment, deception of the grand jury

by the prosecutor must reach some particular level, although the level was not articulated. 601 F.2d at 623.

In the present case the trial judge found three separate types of misconduct, which in the aggregate constituted fundamental unfairness. The trial judge cited as misconduct the manufacture of federal jurisdiction, violation of the Justice Department's internal guidelines respecting treatment of target witnesses, and abuse of the grand jury process, which finding of abuse was based on the Judge's determination that Petitioner was called before the grand jury for the sole purpose of affording him an opportunity to perjure himself. (Memorandum and Order at 4B-7B, *infra*). Despite these findings by the trial judge, the Court of Appeals determined that the proceedings were not fundamentally unfair. The Fifth Circuit would thus appear to have substantially lower standards for prosecutorial conduct than the Second Circuit.

In *United States v. Doss, supra*, the Sixth Circuit held that grand jury proceedings were void where a defendant was called to testify concerning activities for which he had already been indicted. The court determined that the grand jury process had been abused since the defendant was not called for purposes of investigation but rather to elicit incriminatory statements. The Fifth Circuit in the instant case distinguished *Doss* by assuming that the indictment against Petitioner was prepared after his testimony was received. Slip op. at. 7386, n.16). Considering standard prosecutorial practice, the complexity of the indictment, the fact that it was filed on the same day as defendant's appearance, and that a superseding indictment containing the perjury counts was not returned until August 1, 1978, the assumption is quite unrealistic. Yet even accepting the assumption as correct, the distinction between the instant case and *Doss* is one of form rather than substance. Whether the indictment was typed before or after Petitioner testified is of little moment in the presence of the trial court's finding that Petitioner was called for the sole purpose of allowing him to perjure himself, and the government's admission that they thought they had enough evidence to obtain the indictment without defendants' testimony. Judge O'Conor

found that the grand jury had no need for defendant's testimony and that the evidence already gathered was such that nothing defendants could say would prevent an indictment. The conduct of the prosecutor in the instant case was no less abusive than that of the prosecutor in *Doss*.

This case differs only slightly from the fundamentally unfair situation envisioned by this Court in *United States v. Washington*, 430 U.S. at 190, n.6, where a target witness is hailed before a grand jury with the aid of governmental misconduct and then is not properly warned of his target status. The "governmental misconduct which undermined the fairness of the proceedings" in the instant case was found as a fact by the trial judge and has already been noted above. And Petitioner's target witness warning came only after he was already in the grand jury room, and not, as the guidelines required, on a printed form attached to the subpoena he received the previous day.

Grand jury reform is currently a popular topic and proposals are numerous. *See e.g.*, citations in *United States v. Ciambarone*, 601 F.2d at 622, n.5. Reflected in the movements for reform is a growing lack of confidence in the grand jury as a buffer between the citizen and the sovereign. This lack of confidence is fully justified when the process is abused and reduced to a mere tool of overzealous prosectuion. Clear limits on prosecutorial conduct with respect to grand jury proceedings are a must if the grand jury is to serve its historic function. The isolated and uncoordinated pronouncements of the Courts of Appeals are of no help in defining these limits. It is thus of the utmost public importance that this Court instruct the lower courts as to what those limits are.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari should be granted to review the

judgment of United States Court Of Appeals for the Fifth Circuit.

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CERTIFICATE OF SERVICE

I, a member of the bar of this Court, in accordance with Rule 33, Supreme Court Rules, certify that three true and correct copies of the foregoing Petition for Writ of Certiorari were served on the parties involved in this case on the _____ day of January, 1980, by placing the same in the United States Mails, first-class postage prepaid, addressed to the Honorable Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530, and the Honorable A. J. "Tony" Canales, United States Attorney for the Southern District of Texas, P.O. Box 61129, Houston, Texas 77208, Counsel for the Government; and to Mr. Ramon Garcia, 107 N. 10th Street, Edinburg, Texas 78539, Counsel for Co-Defendant Patricia Parada.

Francis James Maloney, Jr.

APPENDIX A

APPENDIX A-1: Opinion of the Court Below

APPENDIX A-2: Judgment of the Court Below

APPENDIX A-3: Order of the Court Below on Petition for Rehearing and Suggestion for Rehearing En Banc

UNITED STATES of America, Plaintiff-Appellant,

v.

Oscar McINNIS and Patricia Parada, Defendants-Appellees.

No. 78-3277.

United States Court of Appeals, Fifth Circuit.

Sept. 10, 1979.

The United States appealed decision of the United States District Court for the Southern District of Texas, Robert O'Conor, Jr., J., dismissing charges of conspiracy to kidnap and perjury; defendants filed motions to dismiss the appeal. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) no jeopardy attached when district court heard evidence in course of deciding defendants' motions to dismiss indictment, and thus Government's appeal was not barred under statute proscribing an appeal by United States where double jeopardy clause of United States Constitution prohibits further prosecution; (2) a charge of conspiracy to lure victim across international boundary with Mexico with purpose of later kidnapping victim in Mexico was not proscribed by the federal antikidnapping statute; (3) grand jury had jurisdiction to investigate conduct that might have been a federal crime and thus could properly call witnesses who could shed light on events in question; and (4) although Government's attempts to conceal its investigation from defendants because one defendant's status as a law enforcement officer may have been ill-considered, Government's conduct surrounding defendant's appearances before grand jury did not cross constitutional line and thus could not afford basis for dismissal of indictment for perjury.

Affirmed in part; reversed and remanded in part.

1. Criminal Law ⇐177

No jeopardy attached when district court heard evidence in course of deciding defendants' motions to dismiss indictment, and thus Government's appeal was not barred under statute proscribing an appeal by United States where double jeopardy clause of United States Constitution prohibits further prosecution. 18 U.S.C.A. § 3731; U.S.C.A.Const. Amend. 5.

2. Criminal Law ⇐1069(1)

Government's appeal within 30 days of entry of a written and signed order granting dismissal of indictment was timely, notwithstanding that more than 30 days had passed after district court had by oral statement dismissed the indictment from the bench, absent evidence that formal order had been prepared to circumvent rule or to extend time for appeal. Fed.Rules App.Proc. rule 4(b), 28 U.S.C.A.

3. Indictment and Information ⇐144.-1(1)

Court of Appeals would not enforce, by dismissal of indictment, claimed policy of Justice Department precluding a federal trial where a state prosecution on same matter is pending when federal charges were filed.

4. Conspiracy ⇐25

It is not an offense to conspire to do an act that, if completed, would not be a crime.

5. Kidnapping ⇐1

A charge of conspiracy to lure victim across international boundary with Mexico with purpose of later kidnapping victim in Mexico was not proscribed by the federal antikidnapping statute. 18 U.S.C.A. § 1201.

6. Grand Jury ⇐26

Grand jury had jurisdiction to investigate conduct that might have been a federal crime and thus could properly call witnesses who could shed light on events in question, notwithstanding that subsequent charged conspiracy to lure a victim across an international boundary with purpose to then kidnap him was not proscribed by federal antikidnapping statute; thus, charges of making false material declarations to a grand jury while grand jury was investigating such events were proper. 18 U.S.C.A. §§ 1201, 1623(a).

7. Indictment and Information ⇐144.-1(1)

Courts are not charged with enforcing internal government guidelines such as guidelines of Justice Department proscribing manner in which defendants are brought before grand jury, and courts will not remedy such an alleged violation by dismissal of an indictment.

8. Indictment and Information ⇐144.-1(1)

Although Government's attempts to conceal its investigation from defendants because of one defendant's status as a law enforcement officer may have been ill-considered, Government's conduct surrounding defendants' appearances before grand jury did not cross constitutional line and thus could not afford basis for dismissal of indictment for perjury.

Appeal from the United States District Court for the Southern District of Texas.

Before GOLDBERG, FAY and RUBIN, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The United States contends that the Lindberg Act, the federal anti-kidnapping statute, as amended, 18 U.S.C. § 1201, forbids a conspiracy to lure a victim across an international boundary and then to kidnap him, and seeks to set aside a judgment dismissing an indictment charging those acts as a federal offense. It also appeals the dismissal of several counts of making false material declarations to a grand jury, in violation of 18 U.S.C. § 1623(a), while the grand jury was investigating those events. We conclude that the conspiracy charged is not proscribed by the federal statute. However, the grand jury did have jurisdiction to conduct an investigation and we remand for further proceedings on the false swearing counts.

I. Facts

Defendant Oscar McInnis was the district attorney for Hidalgo County, Texas, and also conducted a private law practice. The co-defendant, Patricia Parada, was his client. Noe Villanueva, the alleged victim of the kidnapping plot, was once married to Parada. Villanueva, who was confined in the Hidalgo County Jail, was secretly working as a government agent during the events under consideration in this case.

The government alleged that McInnis planned to arrange for Villanueva to be

released from jail, so that, in accordance with a scheme plotted with Parada, Villanueva could then be lured by Parada into Mexico, where he would be kidnapped and killed by Mexican police authorities in Reynosa, Mexico. However, Parada did not plan to go to Mexico; Villanueva was to travel alone. Daniel Rodriguez, an inmate at Hidalgo County Jail and a government informant, was enlisted by McInnis to contact a Mexican police officer named Cantu who would intercept Villanueva, hold him and arrange for his murder.[1] The meeting in Reynosa, the kidnapping, and the murder never occurred.[2]

The counts of making false material declarations to a grand jury arose out of McInnis's and Parada's testimony before the grand jury on June 7, 1978.[3] McInnis and Parada were called to testify after tape-recordings of their conversations with Rodriguez and Villanueva were played for the grand jury.[4]

1. Recordings of conversations between McInnis and Rodriguez comprise the bulk of the government's evidence against the defendants.

2. The indictment does not reveal any motive for this scheme. However, in its brief, the government says, "McInnis had animosity toward Villanueva, as he was bothering women whom the former knew" and McInnis "felt that Villanueva was a 'bastard' and a 'pest.'" The government suggests no reason for Parada's alleged complicity in the plot.

3. For the purposes of this opinion, we will accept, without deciding, the government's allegation that the grand jury was investigating the conspiracy to kidnap Villanueva and possible violations of his civil rights. *But see United States v. Cosby*, 5 Cir. 1979, slip op. 7111, —— F.2d ——.

4. The circumstances surrounding the defendants' appearances before the grand jury were unusual. The subpoenas did not advise the defendants that they were targets of the grand jury investigation nor were they accompanied by the customary list of the rights of a grand jury witness. However, each of the defendants was warned immediately before testifying that he or she was a target of the grand jury investigation, that his or her testimony could be used against each of them, and each was informed of the constitutional rights against self-incrimination and to consultation with an attorney.

When McInnis was served with his subpoena, the United States Marshal told him that "it might be about some narcotics cases" that he was handling as the district attorney. The United States Attorney's office refused to give McInnis any information about the subpoena until he was formally warned on the record just before entering the grand jury room to testify.

Parada's subpoena was served in a more dramatic fashion. Four FBI agents and two U.S. Marshals served her with it at the university she was attending in Edinburg, Texas. Because her subpoena required her appearance instanter, the government agents took her to the grand jury in Brownsville. She was allowed to call her mother, but did not call her attorney. The district court found that Parada was "dissuaded from calling her attorney" at the time the subpoena was served on her and "was told that her attorney, Mr. McInnis, was waiting for her at the grand jury." According to Parada's testimony, immediately after she was served with the grand jury subpoena she asked to consult with her attorney and her request was refused. Shortly thereafter she was told that Mr. McInnis had also been subpoenaed and was before the grand jury at the courthouse.

At the pre-trial hearing on the motion to dismiss the indictments, the Assistant United States Attorney explained that he directed that the unusual steps be taken to prevent Parada from fleeing to Mexico before she testified, and to prevent the defendants from getting together and talking about their testimony in advance. Had Parada been refused the opportunity to consult with counsel during the grand jury proceedings, or misled by the government into foregoing that right, her right to counsel may have been denied. However, her testimony and the grand jury record make clear that (1) Parada was aware of Mr. McInnis's presence at the courthouse where the grand jury proceedings were in progress; (2) the Assistant U.S. Attorney who conducted the questioning during her grand jury testimony advised

In the course of his testimony, McInnis denied that: (1) he knew the details of the planned meeting between Villanueva and Parada in Reynosa or related them to Rodriguez; (2) he recalled meeting Parada at the time that she had agreed to meet Villanueva in Mexico; (3) he discussed the murder of Villanueva with Dan Rodriguez; (4) he discussed Officer Cantu with Rodriguez; (5) he received Villanueva's identification papers; and (6) he discussed the possibility of setting up Villanueva for arrest on narcotics charges or on charges of hiring someone to kill Villanueva's mother-in-law. These statements formed the basis of the six charges of perjury against McInnis.

During her testimony to the grand jury, Parada denied that she had agreed to meet Villanueva in Mexico and that McInnis had advised her to deny that such a meeting had been agreed upon. These statements were used as the basis for the charge of perjury brought against her.

The defendants were charged by indictment with conspiracy to kidnap and perjury. They filed motions to dismiss the kidnapping charge, premised on the theory that the acts alleged to have occurred in the course of the conspiracy to kidnap Villanueva were not prohibited by 18 U.S.C. § 1201, and motions to dismiss the perjury charges, based primarily on the contentions that the declarations were not material to an investigation within the jurisdiction of the grand jury, and that the institution of the prosecution was defective because the government failed to follow the internal guidelines of prosecutorial practice established by the Department of Justice. After a pre-trial hearing on September 8, 1978, the district court dismissed all counts of the indictment from the bench. A written Memorandum and Order, denominated "the ruling of the Court" was signed September 15 and filed September 19.

The government filed a notice of appeal from the dismissal on October 13, 1978. It contends that the trial court was clearly erroneous in dismissing the kidnapping conspiracy count and the perjury counts. In response, the defendants filed motions to dismiss the appeal contending that the government's appeal was barred by statute, that the appeal was not timely, and that the prosecution violated the Justice Department's *Petite* policy.

II. Motions to Dismiss the Appeal

[1] There is no merit to the contention that jeopardy attached when the district court heard evidence in the course of deciding the motions to dismiss the indictment and that the government's appeal, therefore, is barred by 18 U.S.C. § 3731, which provides "no appeal [by the United States] shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." The Supreme Court has recently cut the ground from under the appellant's thesis by holding that "the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy clause"; therefore, the government may appeal from the dismissal of an indictment after evidence has been taken on a motion to dismiss. *United States v. Scott*, 1978, 437 U.S. 82, 97, 98 S.Ct. 2187, 2197–98, 57 L.Ed.2d 65, 78.[5] Here as in *Scott*, none of the grounds upon which the district court dismissed the indictment related to the factual guilt or innocence of the defendants.

[2] The defendants also contend that the government's appeal was not timely because notice of the appeal was filed more than thirty days after the district court dismissed the indictment from the bench. However, the appeal was filed within thirty days of the entry of a written and signed order granting the motion. The signed formal order is the "judgment"[6] and the prior oral statement from the bench was not an appealable order. *United States v. Hark*, 1944, 320 U.S. 531, 534–35, 64 S.Ct. 359, 361, 88 L.Ed. 290, 294–295; *United States v. St. Laurent*, 1 Cir. 1975, 521 F.2d 506, 511, *cert. denied*, 1976, 423 U.S. 1049, 96 S.Ct. 775, 46 L.Ed.2d 637; *United States v. Lee*, 1974, 163 U.S.App.D.C. 330, 339, 501 F.2d 890, 891 n. 1. There is no evidence that the formal order was prepared to circumvent the rule or to extend the time for the appeal.

[3] It is equally vain to invoke the Justice Department's *Petite* policy[7] on the basis that a state prosecution of the same matter was pending when the federal charges were filed. We have repeatedly refused to enforce that policy by dismissing an indictment; the practice of avoiding dual prosecution sets only an internal guideline for the Justice Department. *E. g., United States v. Michel*, 5 Cir. 1979, 588 F.2d 986, 1003 n. 19, *pet. for cert. filed*, 47 U.S.L.W. 3672; *United States v. Nelligan*, 5 Cir. 1978, 573 F.2d 251, 255.[8]

III. Dismissal of the Indictment

A. *Conspiracy to Kidnap*

[4, 5] The district court dismissed the conspiracy to kidnap count of the indictment on the ground of "legal impossibility"; it is not an offense to conspire to

Parada of her right to consult with an attorney before answering any question; and (3) she was informed of the subject matter of the investigation and told that she was a target of the investigation.

Appellees do not contend that Parada's right to counsel was denied. Nor do they suggest that the government's actions in this regard violated fundamental fairness or constituted an abuse of grand jury process. Given the evidence that Parada was informed of her right to counsel and was neither coerced nor manipulated into abandoning that right, we cannot join the district court's assumption of government misconduct.

5. *See also Serfass v. United States*, 1975, 420 U.S. 377, 389, 95 S.Ct. 1055, 1063, 43 L.Ed.2d 265, 274 ("jeopardy had not yet attached when the District Court granted petitioner's motion to dismiss the indictment"); Cooper, *Government Appeals in Criminal Cases: The 1978 Decisions*, 81 F.R.D. 539 (1979).

6. Rule 4(b), F.R.A.P., provides in pertinent part:

> When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is entered in the criminal docket.

7. The *Petite* policy bars a federal trial following a state prosecution for the same acts, "unless the reasons are compelling." *Rinaldi v. United States*, 1977, 434 U.S. 22, 25 n. 5, 98 S.Ct. 81, 82, 54 L.Ed.2d 207, 211. *See also Petite v. United States*, 1960, 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed.2d 490.

8. *Cf. United States v. Caceres*, 1979, — U.S. —, 99 S.Ct. 1465, 59 L.Ed.2d 733 (evidence obtained in violation of IRS internal regulations would not be excluded from a criminal prosecution; enforcement of the regulations left to the executive agency); *United States v. Hayes*, 5 Cir. 1979, 589 F.2d 811, 818 (statement by the Attorney General that was not promulgated and published as an official regulation cannot be used to invalidate an otherwise valid grand jury indictment).

do an act that, if completed, would not be a crime.[9] The government contends that the federal statute is violated when a victim is merely inveigled into crossing an international boundary with the purpose of later kidnapping him; the defendants' scheme to seduce Villanueva across the international boundary so that a Mexican officer could kidnap him made them responsible as principals under 18 U.S.C. § 2(b).[10] That theory will not bear exposure to the words of the statute. The federal kidnapping statute, 18 U.S.C. § 1201, as originally enacted in 1932, clearly reached only a kidnapping followed by interstate transportation, for it read:

> Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

The anti-kidnapping statute was adopted following the kidnapping of the son of Charles and Ann Morrow Lindberg, which was then prosecutable only as a state offense, to assist the states in combatting a "growing and serious menace." *Chatwin v. United States,* 1946, 326 U.S. 455, 463, 66 S.Ct. 233, 237, 90 L.Ed. 198, 902. "Comprehensive language was used to cover every possible variety of kidnaping *followed by interstate transportation.*" *Ibid* (emphasis supplied).[11] However, despite its broad language, the statute did not make either all abductions or even every seduction of victims into another state a federal crime. "In short, the purpose of the Act was to outlaw interstate kidnapings rather than general transgressions of morality involving the crossing of state lines." *Ibid.*

In oral argument, the government conceded that the plan would not have been a federal offense under the language of the original Lindberg Act even if it had been consummated. It asserted instead that the definition of the crime had been broadened by an amendment passed by the 92d Congress in 1972, P.L. 92–539, 86 Stat. 1070, to expand protection of foreign officials and other "official guests" of the United States. *See* S.Rep. No. 92–1105, 92d Cong., 2d Sess. 1, *reprinted in* [1972] U.S.Code Cong. & Admin.News, p. 4316. The full text of the statute as then amended is set forth in the margin.[12] While the clarity of the description of the federal offense as kidnapping followed by interstate transportation was blurred, there is nothing in the history of the amendment to indicate an intention to convert the statute into a proscription of interstate transportation in order to accomplish a later kidnapping. The Senate Judiciary Committee noted that the law was amended "to make the thrust of the offense the kidnapping itself rather than the interstate transporting of the kidnapped person." *Id.* U.S.Code Cong. & Admin.News at 4317–4318. In the section-by-section analysis of the bill, the report explained:

> In lieu of the sole jurisdictional base of transportation in interstate or foreign commerce jurisdiction to punish kidnapping is provided when (1) the victim is transported in interstate or foreign commerce (*as under existing law*) (2) the kidnapping occurs within the special maritime and territorial jurisdiction of the United States, or (3) in the special aircraft jurisdiction of the United States; or (4) the victim is a foreign official within the purview of section 1116 of title 18.

Id. U.S.Code Cong. & Admin.News at 4326 (emphasis supplied). The Secretary of State and the Attorney General of the United States shared this view of the impact of the new legislation. *See id.* U.S.Code Cong. & Admin.News at 4323. Thus, the 1972 amendments expanded federal statutory jurisdiction over kidnapping and made the kidnapping rather than interstate transportation the heart of the offense but it did not alter the definition of the federal crime, as described in *Chatwin,* for kidnappings that do not take place within the special maritime, territorial or aircraft jurisdictions of the United States, or do not involve foreign officials, internationally protected persons, or official agents of the United States. *Compare, e. g., United States v. Young,* 4 Cir. 1975, 512 F.2d 321, *cert. denied,* 424 U.S. 956, 96 S.Ct. 1432, 47 L.Ed.2d 362 (kidnapping at Washington National Airport).[13]

9. *See, e. g., United States v. Pheaster,* 9 Cir. 1976, 544 F.2d 353, 362, *cert. denied,* 1977, 429 U.S. 1099, 97 S.Ct. 1118, 51 L.Ed.2d 546.

10. "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

11. *See also United States v. Atchison,* 7 Cir. 1975, 524 F.2d 367, 370 n. 4, *quoting Gawne v. United States,* 9 Cir. 1969, 409 F.2d 1399, *cert. denied,* 1970, 397 U.S. 943, 90 S.Ct. 956, 25 L.Ed.2d 123 ("the true elements of the offense are an unlawful seizure and holding, followed by interstate transportation").

    The Fifth Circuit's formulation of the elements of kidnapping under the statute is not materially different. *See United States v. McBryar,* 5 Cir. 1977, 553 F.2d 433, *cert. denied,* 434 U.S. 862, 98 S.Ct. 191, 54 L.Ed.2d 136; *Hattaway v. United States,* 5 Cir. 1968, 399 F.2d 431 ((1) transportation in interstate commerce; (2) of an unconsenting person who is (3) held "for ransom or reward, or otherwise"; (4) such acts being done knowingly and willfully).

12. "**§ 1201. Kidnaping**

    "(a) Whoever unlawfully seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds for ransom or reward or otherwise any person, except in the case of a minor by the parent thereof, when:

    "(1) the person is willfully transported in interstate or foreign commerce;

    "(2) any such act against the person is done within the special maritime and territorial jurisdiction of the United States;

    "(3) any such act against the person is done within the special aircraft jurisdiction of the United States as defined in section 101(32) of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1301(32)); or

    "(4) the person is a foreign official as defined in section 1116(b) or an official guest as defined in section 1116(c)(4) of this title,

    shall be punished by imprisonment for any term of years or for life.

    "(b) With respect to subsection (a)(1), above, the failure to release the victim within twenty-four hours after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a rebuttable presumption that such person has been transported in interstate or foreign commerce.

    "(c) If two or more persons conspire to violate this section and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life."

13. Other amendments to the kidnapping act have not made material changes in § 1201(a)(1) or (c). *See, e. g.,* H.Rep. No. 94–1614, 94th Cong., 2d Sess., *reprinted in* [1976] U.S.Code Cong. & Admin.News, pp. 4480, 4483 (accompanying P.L. 94–467, 90 Stat. 1997, providing criminal penalties if the victim of a kidnapping is an internationally protected person and for attempted kidnapping

The alleged plan did not encompass taking or holding Villanueva against his will and then transporting him in foreign commerce. The government has never contended that Villanueva was to be detained involuntarily in any fashion before he was to be transported in foreign commerce. The contention that the statute was violated when McInnis and Parada conspired to cause Villanueva to transport himself across an international line by a Lorelei-promise of a south-of-the-border meeting with Parada must fail for it lacks support either in the statute or the jurisprudence.

Under various statutes predicated on interstate commerce, defendants have been held responsible for causing the interstate or foreign transportation of a person or an article, even where the defendants have not done the transporting themselves. For example, the National Stolen Property Act, 18 U.S.C. § 2314, which prohibits, among other things, the transporting in interstate commerce of goods taken by fraud, has been held to reach the action of a defendant who, by presenting a check drawn on a California bank for payment in a Texas bank, thereby "caused" the check to be transported in interstate commerce since it was reasonably foreseeable that in the ordinary course of business the Texas bank would use the mails to collect a check drawn on a California bank. *Pereira v. United States,* 1954, 347 U.S. 1, 8–9, 74 S.Ct. 358, 363, 98 L.Ed. 435, 444. Similarly, prison inmates who caused others to ship narcotics in interstate commerce were held to have violated 18 U.S.C. § 1952, which provides that "[w]hoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to" further unlawful activities violates the section. *United States v. Levine,* 10 Cir. 1972, 457 F.2d 1186. In the same vein, a defendant who induced an automobile salesman to drive a stolen car across state lines violated 18 U.S.C. § 2312, which proscribes the interstate transportation of stolen vehicles, even though the salesman was unaware that the automobile was stolen. *United States v. Leggett,* 7 Cir. 1959, 269 F.2d 35, *cert. denied,* 361 U.S. 901, 80 S.Ct. 209, 4 L.Ed.2d 156. In none of those cases did the defendants physically participate in the interstate transportation element of the offense, but in each case some instrumentality was employed by the defendant to "cause" interstate movement—for example, the postal service, *Pereira, supra;* an accomplice, *Levine, supra;* or an innocent agent, *Leggett, supra.* No case has been cited in which causation has been imputed because the victim transported himself.

Moreover, the interstate travel in each case occurred after some significant and unlawful step had been taken toward the commission of the federal offense—for example, the fraudulent receipt of a check, *Pereira, supra*; the establishment of an illegal business enterprise, *Levine, supra*; or the theft of an automobile, *Leggett, supra.*

The federal anti-kidnapping statute similarly contemplates situations where an offender "*unlawfully* seizes, confines, inveigles, decoys, kidnaps, abducts, or carries away and holds" the victim, and

of foreign officials, internationally protected persons, and official guests); S.Rep. No. 2820, 84th Cong., 2d Sess., *reprinted in* [1956] U.S. Code Cong. & Admin.News, pp. 4373, 4374 (accompanying P.L. 84–983, 70 Stat. 1043, authorizing the FBI to investigate kidnappings if the victim has not been released within 24 hours after seizure).

then transports him in interstate or foreign commerce. 18 U.S.C. § 1201 (emphasis added). In contrast to the cases cited to this court where the interstate transportation followed some illegal activity, McInnis and Parada did not contemplate any unlawful act before Villanueva crossed the international boundary. It is true that Parada attempted to "decoy" Villanueva into Mexico, but, prior to his arrival in Mexico, no unlawful interference with Villanueva's actions was intended.

The kidnapping statute thus fits into a common statutory model for federal offenses that premise federal jurisdiction on the offender's unlawful exercise of control over a person or object followed by the interstate transportation of that person or object. *See* The National Comm'n. on Reform of Federal Criminal Laws, Study Draft of a New Criminal Code 14 (1970). *See, e. g.* 18 U.S.C. §§ 2312, 2314. The racketeering statute, 18 U.S.C. § 1952, involved in *Levine, supra,* deviates from this pattern only insofar as it premises federal jurisdiction on the interstate travel of or use of interstate facilities by an offender in furtherance of certain illegal activities. The proposed Federal Criminal Code provisions would broaden the kidnapping statute to fit that model by permitting federal prosecution of kidnapping if the offender crosses interstate or national boundaries to commit the offense. The National Comm'n. on Reform of Federal Criminal Laws, *supra,* at §§ 201, 1634. Even that broad jurisdictional base would not reach the conduct of McInnis and Parada who planned neither to cross state or international borders themselves nor to follow the abduction of Villanueva with international travel. The government's theory in this case would invert the sequence of events contemplated by the anti-kidnapping statute by allowing a victim's unrestrained and uncoerced crossing of state or national boundaries, when followed by his abduction, not only to serve as the basis for federal jurisdiction of the offense but also to constitute an element of the crime.

We have held the statute might be violated if the interstate transportation was accomplished at the direction of the defendant by a victim forced to comply, involuntarily, with his wishes, but this was on the thesis that transportation brought about as a result of the defendant's threats was in effect accomplished by the defendant. In *Bearden v. United States,* 5 Cir. 1962, 304 F.2d 532, *vacated on other grounds,* 1963, 372 U.S. 252, 83 S.Ct. 875, 9 L.Ed.2d 732, *rev'd on rehearing,* 320 F.2d 99, *cert. denied,* 1964, 376 U.S. 922, 84 S.Ct. 679, 11 L.Ed.2d 616, an airplane hijacker ordered the pilot to fly to the plane's original destination. After reconsideration at the direction of the Supreme Court, 372 U.S. 252, 83 S.Ct. 875, 9 L.Ed.2d 732, a panel of this court reversed the conviction and granted a new trial, finding that not instructing the jury that the defendant had to be "doing the transporting himself" was a "fundamental error." 320 F.2d at 103.

The Eighth Circuit Court of Appeals has twice held that the anti-kidnapping statute proscribes the decoying or inveigling of a victim to accompany the defendant in interstate commerce. *See United States v. Hoog,* 8 Cir. 1974, 504 F.2d 45, *cert. denied,* 1975, 420 U.S. 961, 95 S.Ct. 1349, 43 L.Ed.2d 437; *Miller v. United States,* 8 Cir., 1943, 138 F.2d 258, *cert. denied,* 1944, 320 U.S. 803, 64 S.Ct. 429, 88 L.Ed. 485. We cannot subscribe to this extension of the act to reach the entirely voluntary act of a victim in crossing a state line even though it is induced by deception.

There is still truth in ancient wisdom and law in maxims older than, but respected by, the Constitution. Criminal statutes are to be strictly construed. *E. g., United States v. Enmons,* 1973, 410 U.S. 396, 411, 93 S.Ct. 1007, 1015, 35 L.Ed.2d 379, 389; *United States v. Dudley,* 5 Cir. 1978, 581 F.2d 1193, 1197. Penal statutes must not be stretched to enable the government to prosecute a defendant merely because what he has done is vile, or, as the government here suggests, a violation of state law that is likely to go unpunished by state authorities. The district court correctly concluded that the indictment should be dismissed because the conduct alleged was not what Congress forbade by the statute. Because of the conclusion we have reached, it is unnecessary to consider the further issue that the statute does not reach a conspiracy that would reach fruition only on foreign soil.

B. *Perjury*

[6] The district court believed that the grand jury was without jurisdiction to consider the alleged conspiracy to kidnap because the conduct exposed did not constitute a federal offense. The experienced trial judge was misled by the defendants into a false equation of what actually constitutes a crime with jurisdiction to investigate to determine whether an offense has been committed. The grand jury has a unique investigative function in our system of criminal justice. It is a "fair method for instituting criminal proceedings." *Cosby v. United States,* 5 Cir. 1979, slip op. 7111, 7115, — F.2d ——, ——, *quoting Costello v. United States,* 1956, 350 U.S. 359, 362, 76 S.Ct. 406, 408, 100 L.Ed. 397, 401. *See also United States v. Calandra,* 1974, 414 U.S. 338, 342–46, 94 S.Ct. 613, 617–19, 38 L.Ed.2d 561, 568–570. Because it is an investigatory agency, and because its primary function is to safeguard defendants from prosecution without probable cause, not to aid the government, the grand jury must necessarily be able to investigate activities that it might later decline to indict. *See In re Grand Jury Proceedings,* 5 Cir. 1977, 558 F.2d 1177, 1179. A grand jury might, following an investigation, decide that a federal offense had likely been committed but refuse to return an indictment; it might decide that the conduct investigated was a state, but not a federal crime; or that the actions were not criminal. Unless the grand jury has such latitude, there is little reason for its existence, and it would be incapable of protecting citizens by exercise of its independent judgment. *See United States v. Shaw,* 5 Cir. 1977, 555 F.2d 1295, 1300 ("The historic task of the grand jury is to inquire into the existence of possible criminal conduct and to return only well-founded indictments").[14]

The plot brought to the attention of the grand jury might have turned out to be a federal crime. The tapes and the other evidence might have revealed that McInnis and Parada planned to take Villanueva to Mexico themselves, or even that the Mexican police officer planned

14. Other circuits have reached the same conclusion about the extent of grand jury authority. *E. g., United States v. Williams,* 8 Cir. 1977, 552 F.2d 226, 230 *quoting United States v. Sisack,* 9 Cir. 1976, 527 F.2d 917, 920 ("The mere possibility that violations of federal law have occurred is sufficient authority for a grand jury investigation."); *United States v. Jacobs,* 7 Cir. 1976, 543 F.2d 18, 21, *cert. denied,* 1977, 431 U.S. 929, 97 S.Ct. 2632, 53 L.Ed.2d 244 ("The mere possibility that the grand jury would not find conduct indictable . . . would not deprive it of authority to investigate to see whether indictable offenses had been committed.").

to bring Villanueva across the border. Nothing came to pass, but this was in part because the hare was himself secretly a hound. However, since the grand jury was investigating conduct that might have been a federal crime it had jurisdiction to call witnesses who could shed light on the events in question.[15]

[7] The district court also noted that the manner in which the defendants were brought before the grand jury violated "the doctrine of fundamental fairness and the guidelines of the Justice Department." However, the courts are not charged with enforcing internal governmental guidelines and will not remedy an alleged violation by the dismissal of an indictment, *Hayes, supra,* 589 F.2d at 818, or the exclusion of evidence, *Caceres, supra,* — U.S. at ——, 99 S.Ct. at 1473, 59 L.Ed.2d at —.

[8] If prosecutorial conduct is so fundamentally unfair as to deny a defendant's constitutional rights, dismissal of the tainted indictment is warranted. *See, e. g., United States v. Graves,* 5 Cir. 1977, 556 F.2d 1319, *cert. denied,* 1978, 435 U.S. 923, 98 S.Ct. 1485, 55 L.Ed.2d 516; *United States v. McCord,* 1974, 166 U.S.App.D.C. 1, 15–17, 509 F.2d 334, 348–51, *cert. denied,* 1975, 421 U.S. 930, 95 S.Ct. 1656, 44 L.Ed.2d 87. In this case, the government's attempts to conceal its investigation from the defendants because of McInnis's status as a law enforcement officer may have been ill-considered; however, its conduct, which we have outlined fully in note 4, did not cross the constitutional line.

The district court also relied upon what it found to be abuse of the grand jury process. The court referred to the policy reasons enunciated in *United States v. Doss,* 6 Cir. 1977, 563 F.2d 265, to justify its dismissal of the perjury counts. In *Doss,* the court found that the defendant's rights to due process and to counsel were violated by the questioning of a witness before the grand jury on a matter for which he had already been indicted by that body. *Accord, United States v. Mandujano,* 1976, 425 U.S. 564, 594, 96 S.Ct. 1768, 1785, 48 L.Ed.2d 212, 232 (Brennan, J., concurring). However, the court noted the "distinction of great moment between grand jury questioning of a witness (even one who might subsequently be indicted) and grand jury questioning of an indicted defendant on the subject of the crime with which he is charged." *Doss, supra,* 563 F.2d at 278. The prosecutor and the grand jury may have thought it likely that McInnis and Parada would be indicted; however, there is no evidence in the record that the indictment had actually been issued at the time that the two testified.[16] Indeed, the testimony of McInnis and Parada might have persuaded the grand jury not to indict them or the grand jury might have concluded eventually as we have, that the conduct

15. Of course, speculation in this opinion does not prove the scope of the grand jury investigation or the materiality of the witnesses' statements. These tasks are for the government at trial. *E. g., United States v. Cosby,* 5 Cir. 1979, slip op. 7111, 7113, — F.2d ——, ——.

16. We note, however, that McInnis and Parada testified on the morning of June 7, 1978, the same day that the first indictment (for conspiracy to kidnap only) was filed. The filing stamp does not indicate the precise time of filing. We assume, without deciding, that the indictment was prepared and filed after McInnis and Parada testified to the grand jury.

they planned was not a federal offense. "A grand jury's investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." *United States v. Cuesta*, 5 Cir. 1979, 597 F.2d 903, 921 *quoting United States v. Stone*, 2 Cir. 1970, 429 F.2d 138, 140.

In short, we cannot agree that the perjury indictments should have been dismissed as a matter of law. The government must be given the opportunity to prove at trial that the defendants were guilty as charged.

IV. Conclusion

For the reasons discussed above, the motion to dismiss the appeal is DENIED; the dismissal of the conspiracy to kidnap count of the indictment is AFFIRMED; and the dismissal of the perjury counts is REVERSED. The case is REMANDED for trial of the perjury counts only.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

United States Court of Appeals

For the Fifth Circuit

October Term, 19

No. 78-3277

D. C. Docket No. B-78-333-S

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

OSCAR McINNIS and PATRICIA PARADA,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

Before GOLDBERG, FAY and RUBIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed as to the conspiracy to kidnap count, and reversed as to the perjury counts; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court.

September 10, 1979

ISSUED AS MANDATE:

APPENDIX A-2

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK
November 19, 1979

Gilbert F. Ganucheau
Clerk

Tel 504-589-6514
600 Camp Street
New Orleans, La. 70130

TO ALL PARTIES LISTED BELOW:

No. 78-3277 — USA v. Oscar McInnis and Patricia Parada

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 10) the petition( ) for rehearing en banc has also been denied.*

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By Sally Hayward
Deputy Clerk

*On behalf of Oscar McInnis.

Mr. John Potter
Mr. Frank Maloney
Mr. Ramon Garcia

APPENDIX A-3

APPENDIX B

MEMORANDUM AND ORDER

MEMORANDUM AND ORDER

(Caption Omitted)

This Court on September 8, 1978 in Brownsville, Texas heard the motion for dismissal of the above named defendants. All parties had announced ready. Evidence and arguments were presented by all parties. This Court ruled from the bench, dismissing all counts of the superceding indictment in this case as to both defendants. This Memorandum and Order is the ruling of the Court.

I.

Defendant McInnis is the district attorney for Hidalgo County, Texas. Defendant Patricia Parada is a client of McInnis. (Hidalgo County evidently permits its district attorney to maintain a private practice) Noe Villanueva is the ex-husband of Patricia Parada; Villanueva had been in the Hidalgo County jail during part of the events made the basis of the indictment and was an agent of the government. Daniel Rodriguez was a prisoner in the Hidalgo County jail during all of the relevant events herein and was throughout those events an agent of the government. Likewise, Brig Marmelejo, the Sheriff of Hidalgo County, was an agent of the government. The rather bizarre fact situation appears well documented in written transcripts of taped conversations attached to motions to dismiss and answers to those motions. Both Villanueva and Rodriguez were equipped with sound recording devices during their various conversations with the defendants. It is not clear how Rodriguez and McInnis met or who actually proposed the murder of Villanueva, but it is quite clear that Rodriguez offered to arrange for a friend of his, Cantu, a policeman in Reynosa, Mexico, to murder Villanueva if Vallanueva could be persuaded to go to Reynosa. McInnis accepted Rodriguez' seemingly simple solution to his malevolence toward Villanueva. Defendant Parada was used to induce Villanueva to go to Reynosa, Mexico to discuss his visitation rights.

II.

The taped conversation between Parada and Villanueva reveals that Villanueva suggested Reynosa as the meeting place to which she agreed. Villanueva was to travel alone to Reynosa and was to provide his own transportation.

The plan to murder Villanueva did not contemplate a taking or holding of Villanueva against his will and then a transporting of the victim against his will or under false pretenses in foreign commerce. Both the transporting across state lines and the holding against the victim's will are necessary elements of the crime of kidnapping. *U. S. v. McBryar,* 553 F.2d 433 (5th Cir. 1977). The government did not address the issue of holding, but did attempt to overcome the deficiency of the transportation element by contending the 18 U.S.C. § 2(b) imputes Vilanueva's transportation of himself to Reynosa to McInnis and Parada. For an example of the appropriate and an analogous application of 18 U.S.C. § 2(b) imputes Villanueva's transportation of himself to 347 U.S. 1 (1954), wherein a fraudulently obtained California check was presented to a Texas bank for

collection, which act resulted in the check being mailed to California. The *Pereira* court held that "[w]here one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used" within the meaning of the mail fraud statute 18 U.S.C. § 1341.[1] *Id* at 362. The government's application of *Pereira* to the facts of this case is inapposite. Had Parada and McInnis caused someone else to transport Villanueva against his will or under false pretenses to Mexico, then the *Pereira* rationale would work to attribute Villanueva's transportation to the defendants. Also, had Parada and McInnis confined Villanueva in a box and had him transported by an innocent carrier, such as a train or bus, then the defendants would have caused Villanueva's foreign transportation within the meaning of 18 U.S.C. § 2(b). The requisite elements of kidnapping herein are missing. The defendants' motion to dismiss was granted on the grounds of legal impossibility due to this Court being without jurisdiction of a crime beyond the parameters of federal law.

III.

The perjury counts of this indictment as to both defendants were dismissed for several reasons. The first reason related to this Court's holding that Count One of the indictment does not state nor does the evidence show a crime falling within the jurisdiction of this Court. The Court being without jurisdiction it follows

1. 18 U.S.C. § 1341 required proof of a scheme to defraud and then mailing of a letter, etc., for the purpose of executing the scheme. *Pereira* at 362.

that the grand jury was also without jurisdiction to consider the matter. That being the case, any statements made before the grand jury would lack materiality to any legitimate area of inquiry for the grand jury, materiality being a requisite of the crime of perjury. The making of false declarations before a grand jury on an issue material only to an investigation beyond its jurisdiction or authority does not constitute perjury. *United States v. Jacobs,* 543 F.2d 18 (2nd Cir. 1976), certiorari denied 431 U.S. 929.

The second reason and perhaps more importantly is that in bringing the two defendants before the grand jury the government was violative of the doctrine of fundamental fairness and the internal guidelines of the Justice Department. It is the internal policy of the Justice Department to advise a grand jury witness: (1) of the general subject matter of the grand jury's inquiry (to the extent that such disclosure does not compromise the progress of the investigation or otherwise inimically affect the administration of justice), (2) of his right to refuse to answer any question if a truthful answer to the question would tend to incriminate him, (3) that anything the witness does say may be used against him, and (4) that the grand jury will permit the witness a reasonable opportunity to consult with an attorney outside the grand jury room. This notification is to be contained on a printed form that will be appended to all grand jury subpoenas. The Justice Department warns that, while it is a common practice to have target witnesses testify before the grand jury, it may appear unfair in certain cases. Therefore, a target witness should be given an opportunity to appear voluntarily. If voluntary appearance cannot be obtained, the target witness should be

subpoenaed only after the grand jury and U. S. Attorney or the responsible Assistant Attorney General have approved the subpoena. Three criteria are to be applied in making the decision to approve a subpoena: (1) the importance to the successful conduct of the grand jury's investigation of the target's testimony or other information sought; (2) whether the substance of his testimony or other information could be provided by other witnesses; and (3) whether the questions the prosecutor and the grand jury intend to ask or the other information sought would be protected by a valid claim of privilege.

The facts show violation of all of the above rules. The afternoon before he was to appear before the grand jury, defendant McInnis was subpoenaed. Absent from the subpoena was the customary warning to a "target" witness. When McInnis asked the supervisor of U.S. Marshals, who served the subpoena, on what matter the grand jury desired his testimony, the marshal responded that he did not know but guessed that it concerned some narcotics cases. Defendant McInnis made further efforts to learn the subject matter of the grand jury investigation by trying to contact some knowledgeable person in the U.S. Attorney's office in Brownsville. However, that office had been instructed to answer that no one with any knowledge was available. The next morning, four F.B.I. agents and two U.S. Marshals served a subpoena instanter to appear before the grand jury on Patricia Parada, who was in school at Pan American University in Edinburg, Texas. Parada was dissuaded from calling an attorney and was told that her attorney, Mr. McInnis, was waiting for her at the grand jury. She was finally allowed to make one call in English to her mother. She was then escorted to the U.S. Courthouse in Brownsville

under the pretext of some great rush to testify before the grand jury. Her subpoena also failed to state that she was a target of the grand jury investigation nor did her subpoena inform her of her rights as a target witness.

The government intended that the defendants be ignorant of each other's grand jury subpoena and that they both be ignorant of their own status as a target witness. The government claims that it did not issue the usual target witness warnings because it feared compromise to the investigation, flight of the defendants, and endangerment of witnesses. There is no evidence to support the government's excuse for lack of warning. The taped conversations provided the substantive evidence for the crime; it is doubtful that the defendants would leave family, friends and jobs to flee to Mexico; the two government witnesses were safe from harm—Noe Villanueva's whereabouts being known only to the government and Daniel Rodriguez being safely in the hands of Brig Marmelejo, who was cooperating with the government. Had the defendants been given the opportunity to consult with an attorney prior to their appearance before the grand jury it is predictable that they would not have testified before the grand jury.

Even more unfair than the procedures by which Parada and McInnis were brought before the grand jury was the fact that they were compelled to appear and give testimony. There was no need for the defendants to appear before the grand jury. The grand jury had already heard the tapes before the defendants' appearance. The government had the benefit of the testimony of Daniel Rodriguez, Noe Villanueva and Sheriff Brig Marmelejo, all agents of the government. None of the three criteria of the Justice Department for calling a target witness to

testify was present—(1) the grand jury could return an indictment without the defendants' testimony, (2) the same information was provided by the taped conversations, and (3) the questions to be asked of McInnis and Parada would be protected by a valid claim of privilege. The only reason the government could give for calling the defendants before the grand jury was to learn their motive for their planned killing of Villanueva, a detail unnecessary to proving the crime of kidnapping. The evidence shows that the real purpose for calling Parada and McInnis before the grand jury was to get them to perjure themselves. Gail Simmons, a reporter, testified that Brig Marmelejo, the Sheriff of Hidalgo County, said the purpose of subpoenaing defendant McInnis was so that he could perjure himself before the grand jury. Further, the first indictment returned against the defendants charged only a conspiracy to kidnap. Thereafter, the defendants filed their motion for dismissal based on jurisdictional grounds. The government then returned a superceding indictment with the perjury counts appended. The government was using the crime of perjury to insure that the defendants did not slip away. This is not the purpose of a grand jury.

The government cannot manufacture federal jurisdiction by calling a conspiracy to murder a conspiracy to kidnap for the purpose of seeking perjury indictments of targets of their investigations. This Court will not condone such inquisitorial tactics. For policy reasons similar to those of the court in *U.S. v. Doss*, 563 F.2d 265 (6th Cir. 1977), this Court finds that the facts herein show an abuse of the grand jury process.

It is, therefore, ORDERED, ADJUDGED and DECREED that the indictment in this case is dismissed as to all counts and as to both defendants.

Signed at Houston, Texas, this 15th day of September, 1978.

/s/ ROBERT O'CONOR, JR.
Robert O'Conor, Jr.
United States District Judge

APPENDIX C

APPENDIX C-1: Order on Defendant's Motion to Suppress in State Court

APPENDIX C-2: State's Motion to Dismiss and Order in State Court

NO. CR-652-78-D

THE STATE OF TEXAS	§	IN THE 206TH DISTRICT COURT
VS.	§	OF
OSCAR B. MCINNIS	§	HIDALGO COUNTY, TEXAS

ORDER ON DEFENDANT'S MOTION TO SUPPRESS

On this the 5th day of January, 1979, came on to be heard the Defendant's Motion To Suppress all tape recordings and transcriptions thereof of conversations between Daniel Rodriguez and the Defendant Oscar McInnis, and all tape recordings and transcriptions thereof of the Defendant's testimony before the Grand Jury of the United States District Court for the Southern District of Texas, Brownsville Division, and the Court heretofore on November 13, 14 and 15 of 1979 having heard evidence thereof, having had submitted to it briefs by both the State and the Defendant makes the following findings of fact and conclusions of law:

That Daniel Rodriguez was at all times relevant to this indictment acting as an agent for the Hidalgo County Sheriff and/or as an agent for other law enforcement agencies, and as such agent Daniel Rodriguez originated the alleged criminal plot in his own mind which was no more than an imaginary scheme created by said Rodriguez for the sole purpose of inducing and entrapping the Defendant into violating the law, and that such alleged violation of Article

15.03 of the Texas Penal Code by the Defendant would not have occurred except for such inducement;

The Court therefore finds as a matter of law that entrapment was established by the Defendant in violation of Article 8.06 of the Texas Penal Code and that all tape recordings and transcriptions thereof of conversations between Daniel Rodriguez and the Defendant were obtained in violation of said article, and that said tape recordings and transcriptions thereof as per the provisions of Article 38.23 of the Texas Code of Criminal Procedure should be suppressed.

It is therefore ORDERED, ADJUDGED AND DECREED by the Court that said tape recordings and transcriptions therefore shall be and they are hereby suppressed, and the Court directs that no evidential use of them shall be made against the Defendant on the trial of any criminal case.

DONE AND ENTERED this the 5th day of January, 1979.

VERNON D. HARVILLE

Vernon D. Harville,
Judge Presiding

DATE: JAN 29 1979
A true copy I certify
LUCILA TREVINO
District Clerk, Hidalgo County, Texas
By GLORIA EDONER Deputy

APPENDIX C-1

NO. CR-652-78-D

THE STATE OF TEXAS	)	IN THE 206TH DISTRICT COURT
VS.	)	OF
OSCAR B. McINNIS	)	HIDALGO COUNTY, TEXAS

STATE'S MOTION TO DISMISS

TO THE HONORABLE JUDGE VERNON D. HARVILLE, SPECIAL JUDGE IN THE ABOVE CAUSE:

Now comes STATE OF TEXAS, by and through its Appointed Special Prosecutors, MICHAEL J. HINTON and PRESTON E. HENRICHSON, and presents this Motion to Dismiss for the following good and sufficient reasons:

That on November 13, 14 and 15, 1978 an extensive hearing was conducted by this Honorable Court concerning the entrapment issue and that following the submission of briefs the Court, on January 5, 1979, having ruled that the Defendant, OSCAR B. MCINNIS, was entrapped as a matter of law, and

The Court, based upon said ruling of entrapment (as a matter of law) thereafter having suppressed all tapes obtained as evidence in the case, and

The Court, having indicated upon said ruling that if the above cause proceeded to trial (without the tapes) that the jury, at the close of the evidence, would be instructed that there existed in said cause entrapment as a matter of law, therefore directing and requiring the jury to enter a verdict of not guilty;

THEREFORE, based upon said rulings any further attempt at prosecution in this cause would serve no useful purpose but would in fact and in effect be nullified by said rulings, it is respectfully requested that this cause be dismissed.

Respectfully submitted,

MICHAEL J. HINTON

Preston E. Henrichson
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Edinburg, TX 78539
512/383-7453
SPECIAL PROSECUTOR
FOR
STATE OF TEXAS

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4200 Westheimer, Suite 290
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SPECIAL PROSECUTOR
FOR
STATE OF TEXAS

ORDER

The above and foregoing Motion to Dismiss having this date been presented to the Court, and after having considered same, the Court is of the opinion that same should be granted in all things and that the matter is therefore dismissed.

SIGNED and ENTERED this 22d day of January, 1979.

VERNON HARVILLE

Hon. Vernon D. Harville
Special Judge

DATE JAN 29 1979
A true copy I certify
LUCILA TRAVINO
District Clerk, Hidalgo County, Texas
By GLORIA EDONER Deputy

APPENDIX C-2

APPENDIX D

UNITED STATES ATTORNEYS' MANUAL

Internal Guidelines for Treatment
of Target Witnesses

9-11.250 *Advice of "Rights"*

The Supreme Court recently declined to decide whether a grand jury witness must be warned of his Fifth Amendment privilege against compulsory self-incrimination before his grand jury testimony can be used against him. See *United States v. Washington*, Sup. Ct. No. 74-1106 (May 23, 1977) at 5 & 10; *United States v. Wong*, Sup. Ct. No. 74-635 (May 23, 1977); *United States v. Mandujano*, 425 U.S. 564, 582 n.7 (1976). It is important to note, however, that in *Mandujano*, the Court took cognizance of the fact that federal prosecutors customarily warn "targets" of their Fifth Amendment rights before grand jury questioning begins. *United States v. Mandujano*, *supra*. Similarly, in *Washington* the Court pointed to the fact that Fifth Amendment warnings were administered as negating "any possible compulsion to self-incrimination which might otherwise exist" in the grand jury setting. *United States v. Washington*, *supra* at 7.

Notwithstanding the lack of a clear constitutional imperative, it is the internal policy of the Department to advise grand jury witnesses of the following matters: 1) the general subject matter of the grand jury's inquiry (to the extent that such disclosure does not compromise the progress of the investigation or otherwise inimically affect the administration of justice) 2) that the witness may refuse to answer any question if a truthful answer to the question would tend to incriminate him; 3) that anything that the witness does say may be used against him; and 4) that the grand jury will permit the witness the reasonable opportunity to step outside the grand jury room to consult with counsel if he desires. This notification will be contained on a printed form (to be provided by the Department) which will be appended to all grand jury subpoenas. In addition, these "warnings" should be given by the prosecutor on the record before the grand jury when necessary and appropriate (e.g., when witness has not been subpoenaed), and the

witness should be asked to affirm that the witness understands them.

Moreover, although the Court in *United States v. Washington*, *supra*, held that "targets" of the grand jury's investigation are entitled to no special warnings relative to their status as "potential defendant(s) in danger of indictment," we will continue the long-standing internal practice of the Department to advise witnesses who are known "targets" of the investigation (as defined in 9-11.250, *supra*) that their conduct is being investigated for possible violation of federal criminal law. This supplemental "warning" will be administered on the record when the target witness is advised of the matters discussed in the preceding paragraph.

A "subject" of an investigation is a person whose conduct is within the scope of the grand jury's investigation. A "target" is a person as to whom the prosecutor or the grand jury has substantial evidence linking him to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.

9-11.251 *Subpoenaing Targets of the Investigation*

A grand jury may properly subpoena a subject or a target of the investigation and question him about his involvement in the crime under investigation. (*United States v. Wong*, Sup. Ct. No. 74-635 at 6 n.8 (slip opinion) (May 23, 1977); *United States v. Washington*, Sup. Ct. No. 74-1106 at 9 n.6 (slip opinion) (May 23, 1977); *United States v. Mandujano*, 425 U.S. 564, 573-75 & 584 n.9 (1976); *United States v. Dionisio*, 410 U.S. 1, 10 n.8 (1973); *Kastigar v. United States*, 406 U.S. 441, 446 (1972); *Murphy v. Waterfront Commission of New York Harbor*, 378 U.S. 52, 102 (1964) (concurring opinion); *Brown v. Walker*, 161 U.S. 591, 610 (1896); *United States v. Friedman*, 445 F.2d 1076 (9th Cir. 1971); *United States v. Capoldo*, 402 F.2d 821 (2d Cir. 1968); *United States v. Scully*, 225 F.2d 113 (2d Cir.), *cert.*

denied, 350 U.S. 897 (1955)). However, in the context of particular cases such a subpoena may carry the appearance of unfairness. Because the potential for misunderstanding is great, before a known "target" (as defined in 9-11.250, *supra*) is subpoenaed to testify before the grand jury about his involvement in the crime under investigation, an effort should be made to secure his voluntary appearance. If his voluntary appearance cannot be obtained, he should be subpoenaed only after the grand jury and U.S. Attorney or the responsible Assistant Attorney General have approved the subpoena. In determining whether to approve a subpoena for a "target," careful attention will be paid to the following considerations: 1) the importance to the successful conduct of the grand jury's investigation of his testimony or other information sought; 2) whether the substance of his testimony or other information sought could be provided by other wintesses; 3) whether the questions the prosecutor and the grand jurors intend to ask or the other information sought would be protected by a valid claim of privilege.

Supreme Court, U.S.
FILED
MAR 29 1980
MICHAEL RODAK, JR., CLERK

No. 79-1116

In the Supreme Court of the United States

OCTOBER TERM, 1979

OSCAR MCINNIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

WILLIAM C. BROWN
Attorney
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1116

OSCAR MCINNIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 28-39) is reported at 601 F. 2d 1319. The opinion of the district court (Pet. App. 43-50) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 40) was entered on September 10, 1979. A petition for rehearing was denied on November 19, 1979. On December 4, 1979, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to January 18, 1980; the petition was filed on January 17, 1980. The jurisdiction of this Court is invoked under 18 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether counts of an indictment alleging that petitioner gave false testimony before a grand jury should have been dismissed because the conduct being investigated was ultimately found not to have constituted a federal offense.

2. Whether the false declaration counts should have been dismissed because of alleged prosecutorial misconduct regarding petitioner's appearance before the grand jury.

STATEMENT

1. On June 7, 1978, petitioner was indicted in the United States District Court for the Southern District of Texas for conspiring to kidnap Noe Villanueva, in violation of 18 U.S.C. 1201. In a superseding indictment filed two months later, petitioner was charged, in addition to the count alleging conspiracy to kidnap, with six counts of false declarations in violation of 18 U.S.C. 1623. Following a hearing, the district court dismissed the entire indictment on the ground that the conspiracy alleged did not constitute a federal offense and that the false declarations were therefore not material to the grand jury's inquiries. The district court added that the government's conduct in bringing petitioner before the grand jury violated fundamental fairness and the Justice Department's internal guidelines (Pet. App. 43-50). The court of appeals affirmed the dismissal of the conspiracy count but reversed as to the false declaration counts, remanding that portion of the case for trial (Pet. App. 28-39).

2. Petitioner was the District Attorney for Hidalgo County, Texas (Pet. App. 29). The indictment alleged that petitioner and co-defendant Patricia Parada planned to arrange for the release of Villanueva, Parada's ex-husband, from the Hidalgo County Jail (*id.* at 29-30). Villanueva was to be lured by Parada into Mexico, where he would be kidnapped and killed by corrupt police authorities recruited by one Daniel Rodriguez (*id.* at 30). The kidnapping never occurred, however, because Rodriguez and Villanueva were working with the police and had been equipped with recording devices during their conversations with petitioner and Parada (*id.* at 30, 43). The false declaration charges against petitioner arose from statements he made to the grand jury investigating the planned kidnapping, in which he denied his involvement in the scheme (*id.* at 31).

ARGUMENT

Petitioner contends (Pet. 7-26) that the court of appeals erred in reinstating the false declaration counts. First, he contends (Pet. 7-11) that the grand jury's investigation into the kidnapping scheme exceeded its jurisdiction. Second, he contends (Pet. 11-25) that the government abused the grand jury process and violated its own internal guidelines in connection with petitioner's appearance before the grand jury.

1. At the outset, we note that there is no need for the Court to consider petitioner's claim at this time. The ruling below places petitioner in the same position as if the district court had denied his motion to dismiss the false declaration counts. That is an interlocutory order that is not subject to pretrial appeal. See *United States* v. *MacDonald*, 435 U.S. 850, 853-854 (1978); *Cogen* v.

United States, 278 U.S. 221, 222-224 (1929). The same considerations that militate against interlocutory appeal of a motion to dismiss militate against review at this time of the court of appeals' reversal of a dismissal. If petitioner is acquitted at his trial, which has already been delayed by more than one year, there will be no need to consider his claim. If petitioner is convicted and his conviction affirmed, he will then be able to present to the Court all his contentions, including those made here, by seeking review of the final judgment. In short, petitioner's claim "is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967).

2. In any event, there is no merit to petitioner's claim that the false declaration counts should not be reinstated because the grand jury lacked jurisdiction for the investigation that gave rise to those counts. The court of appeals ruled that the federal kidnapping statute, 18 U.S.C. 1201, does not apply where the kidnapping is to occur only after the victim has voluntarily crossed a state line, even if that interstate movement is induced by a deception in order to facilitate the kidnapping (Pet. App. 36). It thus held that the agreement alleged in this case did not constitute a federal offense and affirmed the dismissal of the conspiracy count (Pet. App. 32-37).

The fact that the conduct ultimately exposed may not constitute a federal offense, however, does not in any sense compel the conclusion that a grand jury is without jurisdiction to conduct an investigation of a conspiracy to kidnap. As the court of appeals noted (Pet. App. 37), the district court erroneously equated "what actually constitutes a crime with jurisdiction to investigate to determine if a crime has been committed." The possibility

that violations of federal law have occurred is sufficient authority for a grand jury investigation. A grand jury investigation is not to be limited by "forecasts of the probable result." *Blair* v. *United States*, 250 U.S. 273, 282 (1919). See *United States* v. *Calandra*, 414 U.S. 338, 343 (1974). The grand jury " 'can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.' " *United States* v. *Bisceglia*, 420 U.S. 141, 148 (1975), quoting *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950). See also *United States* v. *Williams*, 552 F. 2d 226, 230 (8th Cir. 1977). As the court below observed, this principle is an integral part of the grand jury system (Pet. App. 37):

> Because it is an investigatory agency, and because its primary function is to safeguard defendants from prosecution without probable cause, not to aid the government, the grand jury must necessarily be able to investigate activities that it might later decline to indict. See *In re Grand Jury Proceedings*, 5 Cir. 1977, 558 F. 2d 1177, 1179. A grand jury might, following an investigation, decide that a federal offense had likely been committed but refuse to return an indictment; it might decide that the conduct investigated was a state, but not a federal crime; or that the actions were not criminal. Unless the grand jury has such latitude, there is little reason for its existence, and it would be incapable of protecting citizens by exercise of its independent judgment.

The plot under investigation here involved interstate movement for the purpose of kidnapping and might well have been found to be a federal crime. Indeed, the grand jury did find that a federal crime was committed, and it was only the resolution of a difficult question of

statutory construction by the court of appeals that established that there was no federal violation. The plot was clearly a legitimate subject of inquiry by the grand jury, to which petitioner's false statements were material, and the fact that the conspiracy count was dismissed does not require dismissal of the false declaration counts. Perjury before a grand jury is not excused simply because the investigation does not result in an indictment.

3. Petitioner also asserts (Pet. 11-25) that dismissal of the false declaration counts is required because of alleged governmental misconduct, including violations of certain internal Department of Justice guidelines regarding the appearance before a grand jury of a "target witness." This contention is without foundation.

First, internal policies of the Department of Justice do not confer any rights on individuals, at least in the absence of exceptional circumstances not present in this case. As the court of appeals properly stated (Pet. App. 38), it was "not charged with enforcing internal governmental guidelines" and clearly it was not required to remedy the alleged violation in this case by dismissal of the indictment. See *United States* v. *Caceres*, 440 U.S. 741 (1979). In the present case, the violation alleged is primarily that the prosecutor violated Department of Justice guidelines by failing to append to petitioner's grand jury subpoena a printed form advising him of his Fifth Amendment rights and the general subject matter of the grand jury's inquiry (Pet. 25). However, as petitioner concedes (*ibid.*), he was fully advised of his rights and notified that he was a target of the investigation prior to giving his testimony (see Pet. App. 30 n.4). Thus the warnings specified in the guidelines were given, even if not in the particular manner that is customary.

It is clear that no constitutional problem is presented here, where petitioner was warned of his constitutional rights and advised that he was a "target." In *United States* v. *Washington*, 431 U.S. 181 (1977), this Court held that failure to advise a witness before a grand jury that he was a "potential defendant" did not require suppression of the witness's testimony. It is also clear that the warnings given here met all constitutional requirements as to content and timeliness. Warnings concerning Fifth Amendment rights, if required at all, need not be given in advance of a grand jury appearance, but are sufficient if administered, as in this case, in the presence of the grand jury. *Id.* at 190-191. Finally, even if the government's conduct in this case could be characterized as "unfair" in some manner, it is clear that petitioner was not entitled to challenge that conduct by committing perjury. See *United States* v. *Wong*, 431 U.S. 174, 180 (1977); *Bryson* v. *United States*, 396 U.S. 64, 72 (1969).

Contrary to petitioner's suggestion (Pet. 16-19), the holding below in no way conflicts with the Second Circuit's opinion in *United States* v. *Jacobs*, 531 F. 2d 87, vacated and remanded, 429 U.S. 909, aff'd on remand, 547 F. 2d 772 (1976), cert. dismissed as improvidently granted, 436 U.S. 31 (1978). In *Jacobs* the court of appeals dismissed a perjury indictment on the basis of its supervisory powers because, unlike petitioner, the witness had not been warned of her status as a target of the investigation prior to her testimony before the grand jury.[1] Similarly, there is no merit to petitioner's contention (Pet. 24-25) that this case conflicts with *United States* v. *Doss*, 563 F. 2d 265 (6th Cir. 1977). In *Doss* the court

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[1]Moreover, *Jacobs* did not establish a rule, but was simply a "one-time sanction to encourage uniformity of practice." 547 F. 2d at 773. See also *United States* v. *James*, 609 F. 2d 36 (2d Cir. 1979), cert. denied, No. 79-1115 (Feb. 25, 1980).

found that it was a violation of due process to question the defendant before the grand jury on a matter for which he had already been indicted by that body. Petitioner, however, does not claim that the indictment in this case had been issued at the time he testified. Although other evidence may have suggested to the grand jury that petitioner should have been indicted, his testimony could have had an important bearing on that decision. As the court of appeals observed, " '[a] grand jury's investigation is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed' " (Pet. App. 39). See *United States* v. *Cuesta*, 597 F. 2d 903, 921 (5th Cir. 1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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